87-706

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MARY KATE LEAMAN,

Petitioner,

vs.

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can a waiver provision in a state statute bar a public employee's first amendment claims under 42 U.S.C. § 1983 in federal court which a state court of limited jurisdiction refused to entertain?

2. Should a decision of a federal circuit court of appeals to hear a matter *en banc* be vacated when a judge who cast an outcome determinative vote on the issue of *en banc* review recuses himself pursuant to 28 U.S.C. § 455 following oral argument on the merits?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the lower courts are: Mary Kate Leaman, plaintiff; Ohio Department of Mental Retardation and Developmental Disabilities (DMR), Minnie Fels Johnson, former director of DMR, Sandra Crockett, Loyce Scott, and Shirley Wilson-Young, employees of DMR, all defendants.

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Petitioner, Mary Kate Leaman, plaintiff in the action below, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on July 23, 1987.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals of July 23, 1987, reported at 825 F.2d 946, is reprinted in Appendix A, pp. 1a-47a. The opinion by the panel of the Sixth Circuit Court of Appeals rendered on July 10, 1986, is reprinted in Appendix B, pp. 48a-54a.

The order of the United States District Court for the Southern District of Ohio of May 14, 1985, reported at 620 F.Supp. 783, is reprinted in Appendix C, pp. 58a-63a. The order and judgment of the District Court of June 13, 1985, is reprinted in Appendix C, pp. 55a-57a.

The Decision and Judgment Entry of the Ohio Court of Claims, filed May 8, 1985, is reprinted in Appendix D, pp. 64a-76a.

The Complaint and Jury Demand, filed in the United States District Court for the Southern District of Ohio on July 11, 1984 is reprinted in Appendix E, pp. 77a-88a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1987. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article VI, Section 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwitstanding.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

Ohio Revised Code § 2743.02(A).

The state hereby waives, . . . its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter . . . . [F]iling a civil action in the court of claims results in a complete waiver of any causes of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officers or employees office or employment or that the officer or employee acted with malicious purpose, in bad faith or in a wanton or reckless manner.

STATEMENT OF THE CASE

Petitioner, Mary Kate Leaman, was employed as a probationary employee with the Ohio Department of Mental Retardation (DMR). Petitioner served as a case management specialist responsible for the placement of and provision of services for children diagnosed as mentally retarded. On April 7, 1984, while still a probationary employee, Petitioner was terminated from her position. Petitioner appealed her dismissal to the state personnel board of review which dismissed the appeal for lack of jurisdiction on account of Petitioner's probationary status.

On July 11, 1984, Petitioner filed a complaint in the United States District Court for the Southern District of Ohio pursuant to 42 U.S.C. Section 1983 and Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794, against DMR and four supervisory officers and agents of DMR in their unofficial, personal capacities. In essence, the complaint, as originally filed and as amended, alleges that the individual defendants violated Petitioner's federal and constitutional rights by summarily discharging her for advocating the rights of juveniles to be properly treated by DMR. Petitioner sought monetary and injunctive relief. On December 14, 1984, Petitioner filed essentially an identical complaint in the Ohio Court of Claims against the State of Ohio only, in which she alleged that DMR violated her federal and constitutional rights.[1]

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[1] It should be recognized that filing separate claims against the State of Ohio and officers and employees thereof in the Court of Claims and United States District Court, respectively, is a strategically sound and justifiable approach to civil rights litigation under Section 1983. For example, the successful interposition of immunity defenses for individual defendants in a federal action may leave the state as the only viable defendant, in which event the Court of Claims would be the only available forum in which to litigate the merits of the claim. Similarly, the court could rule that the individual Defendants were acting in their official as contrasted to their individual capacities thus barring continuation of the suit in federal court because of the Eleventh Amendment. See *Graham* v. *Kentucky*, 473 U.S. 159, 105 S.Ct. 3099 at 3107 (1985). Conversely, a suit against the state in

The defendants in the federal action moved to have Petitioner's complaint dismissed in that court on the grounds that Petitioner's action in the state court of claims against DMR barred her action in federal court against the individual defendants. The Ohio Court of Claims Act, 2743.02 O.R.C., provides, in pertinent part, as follows:

> The state hereby waives, . . . its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter. . . . [F]iling a civil action in the court of claims results in a complete waiver of any causes of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officers or employees office or employment or that the officer or employee acted with malicious purpose, in bad faith or in a wanton or reckless manner.

The federal district court entered an order granting the state's motion to dismiss the federal lawsuit with respect to all of Petitioner's claims against DMR and as to the individual defendants with the condition that Petitioner may refile her complaint in federal court against the individual defendants should the state claims court find that the individual defendants acted outside the scope of their employment or with malice, bad faith, wantonness or recklessness (App. p. 63a).

By a decision dated May 8, 1985, the state claims court dismissed Petitioner's complaint in that court pursuant to the defendant's motion to dismiss under Rule 12 of the Ohio Rules of Civil Procedure. The state claims court determined

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the Court of Claims could conceivably result in a determination that the act or omission under challenge occurred outside the scope of an employee's office or employment, thereby necessitating a separate filing against the individual official. In either scenario, Plaintiff's counsel runs the risk of a bar to the second action in a second forum due to the applicable statute of limitations.

that Petitioner's termination was "in accordance with the law" as it relates to the termination of probationary employees in the State of Ohio (App. p. 65a). The court construed Petitioner's claims "as an appeal challenging the judgment and decision of the state agency" (App. p. 72a). The state court did not rule on Petitioner's constitutonal or federal claims. Instead, the court specifically noted that "the issue of the rights of a '1983' action apparently are being determined in federal court" (App. p. 72a).

Petitioner filed a motion in federal court seeking reinstatement of her federal claims against the individual defendants because the complaint in the state claims court had been determined without decision on the merits. This motion was denied by the federal district judge because the state court dismissal did not establish that the individual defendants acted outside the scope of their employment or with malice which was the condition set by the federal court for the reinstatment of Petitioner's federal claim (App. p. 55a).

Petitioner appealed the federal district court's dismissal of her federal claims under Section 1983 against the individual defendants to the United States Court of Appeals for the Sixth Circuit. A divided panel of that court reversed the decision of the district court dismissing plaintiff's claim. The panel noted that "the ruling [of the district court] undermines the jurisdiction of a federal cause of action under Section 1983 against state officials who allegedly injure a citizen in violation of a federal, constitutional or statutory right" (App. p. 49a).

The defendants sought and obtained *en banc* reconsideration of the district court judgment thereby vacating the panel decision and staying the issuance of the appellate court's mandate remanding the matter to the district court. The vote granting en banc review was eight to seven. Following oral argument on the merits before the entire court, one of the judges who had voted in favor of en banc review disqualified himself from further participation in the case. The judge, as an Ohio state legislator, had drafted and co-sponsored the Ohio Court of Claims Act in question.

At an administrative meeting of the court, the Chief Judge of the Sixth Circuit ruled that recusal of one of the judges did not nullify the recusing judge's prior participation in the en banc procedure. The ruling of the Chief Judge was ratified by an eleven to three vote of the remaining members of the court (Lively dissent, App. p. 28a). The parties were not given the opportunity to brief or argue the effect of recusal on the proceedings.

By an eight to six margin, the Court of Appeals voted to affirm the decision of the district court dismissing Petitioner's federal claims against the individual defendants. All six members of the minority filed separate dissenting opinions.

REASONS FOR GRANTING THE WRIT

I. FIRST QUESTION PRESENTED FOR REVIEW: CAN A WAIVER PROVISION IN A STATE STATUTE BAR A PUBLIC EMPLOYEE'S FIRST AMENDMENT CLAIMS UNDER 42 U.S.C. § 1983 IN FEDERAL COURT WHICH A STATE COURT OF LIMITED JURISDICTION REFUSED TO ENTERTAIN?

In the lower court, by virtue of an eight-to-six vote in an *en banc* proceeding, application of a state statute containing a waiver provision operated as a bar preventing a civil rights litigant the opportunity to prosecute in federal court first amendment claims brought under 42 U.S.C. 1983 against individual defendants, notwithstanding a state court's refusal to entertain the case on the merits.

Such a result is an affront to the integrity and principles of federal jurisdiction established by Congress and the decisions of this Court. In essence, the decision of the court of appeals permits states to burden plaintiffs' abilities to litigate constitutional claims under 42 U.S.C. Section 1983. Thus, in addition to working a harsh or unjust result in the instant matter by denying petitioner any forum in which to vindicate her federal claims, the decision of the court of appeals threatens the important interests in preserving federal courts as an available forum for the vindication of federally created rights.

A. The Court of Appeals decision improperly limits Supreme Court decisions allowing claims under 42 U.S.C. § 1983 to proceed in federal court independent of state-created remedies and procedures.

Congress has clearly stated a strong preference that claims under 42 U.S.C. Section 1983 based on deprivation of constitutional rights be resolved in federal courts, and that federal courts have the duty to take jurisdiction of these cases, see *Monroe* v. *Pape*, 365 U.S. 167, 82 S.Ct. 473 (1961); *Mitchum* v. *Foster*, 407 U.S. 226, 92 S.Ct. 2151 (1972). Con-

sistent with such congressional intent, the precedent from this Court has established that federal courts may not require civil rights litigants to exhaust available state remedies regardless of their adequacy. *Monroe* v. *Pape*, *supra*. This basic principle of federal jurisdiction has been consistently reaffirmed by the Supreme Court:

> When federal claims are premised on [Section 1983] — as they are here — we have not required exhaustion of state judicial or administrative remedies recognizing the paramount role Congress has assigned to federal courts to protect constitutional rights . . . .

Patsy v. *Board of Regents of State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 2560 (1982), quoting from *Steffel* v. *Thompson*, 415 U.S. 452, 472, 473, 94 S.Ct. 1209, 1222 (1974).

Here the lower courts refused to allow petitioner to proceed with her federal civil rights claims against the individual defendants because the state claims court failed to find that the acts of the employees giving rise to the federal cause of action were committed outside the scope of their authority as state employees, or that said acts were committed with malice. The net and real effect of this decision is tantamount to requiring an exhaustion of state judicial remedies as a condition to the acceptance by a federal court of subject matter jurisdiction over a federally-created right of action.

By affirming the trial court's decision, and by making petitioner's access to federal court contingent upon a state court ruling, the Court of Appeals relegates federal court to the role of a secondary forum for the enforcement of federal rights and, in so doing, elevates the state court to the status of gatekeeper to federal district court. Such a result is obviously inconsistent with and contrary to established precedents of this court, e.g. *Monroe*, *Mitchum*, and *Patsy* which allow a federal cause of action to proceed in federal court independently of state-created remedies or procedures. Moreover, the result is "manifestly unfair." (Milburn dissent, App. p. 47a).

B. This Court's decision in *Town of Newton v. Rumery* cannot properly be extended to permit an automatic waiver of 42 U.S.C. § 1983 claims in federal court pursuant to the application of a state statute.

The lower court determined that by filing an action in the state claims court, petitioner accepted a waiver of her federal and constitutional claims against individual officers and employees of the state in exchange for a solvent state defendant. In the view of the Court of Appeals, the "quid pro quo" received by petitioner was neither unfair nor illusory. The lower court's construction of a contractual analysis borrows heavily from the recent decision in *Town of Newton* v. *Rumery*, ____ U.S. ____, 107 S.Ct. 1187 (1987).

In *Rumery* the Supreme Court held that a man who accepted a municipality's offer to dismiss criminal charges against him in exchange for a written waiver of any claims against the city and its officers could not later repudiate the waiver and file a civil action under 42 U.S.C. Section 1983. Although the Supreme Court held that the written waiver was knowing, intelligent, and voluntary under the circumstances in *Rumery*, the Court reaffirmed the strong federal policy against waiver of rights protected under Section 1983. *Id.* at 1193. The Court made clear and explicit, moreover, that "waiver" of 1983 claims is a question of federal law. *Id.* at 1192.

While the Court in *Rumery* applied common law principles in reaching its holding, no "automatic" operation of a state created waiver was considered by the Court, nor was any issue of federal jurisdiction over federally created rights implicated in that decision. It is that precise issue, however, which predominates over all others in this matter. Therefore, the lower court's reliance on *Rumery* simply begs the overriding constitutional questions which of necessity are raised when, as here, state action is deemed automatically to bar litigant's access to federal court on rights created by federal law. (See Merritt dissent, App. p. 29a).

C. The decision of the Court of Appeals precludes federal enforcement of claims under 42 U.S.C. § 1983 notwithstanding the inadequacy or unavailability of state procedures.

It is firmly established that proceedings in state court can have preclusive effect on Section 1983 actions in federal court only when and if a civil rights litigant has been afforded a "full and fair opportunity to be heard." *Allen* v. *McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980); *Haring* v. *Prosise*, 462 U.S. 306, 103 S.Ct. 2368 (1983).

Because of the overriding importance placed by Congress on federal courts' enforcement of federally created rights, *see Monroe* v. *Pape*, supra; *Mitchum* v. *Foster*, supra; and *Patsy* v. *Board of Regents*, supra, this Court has recognized that federal remedies for Section 1983 claims are inviolate and unaffected by state proceedings in three circumstances: where state substantive law is facially unconstitutional; where state procedural law is inadequate to allow full litigation of a constitutional claim; and where state procedural law, though adequate in theory, is inadequate in practice. *Monroe* v. *Pape*, 365 U.S. at 173-74, cited in *Allen* v. *McCurry*, 449 U.S. at 100-01.

Here, the state claims court as a matter of policy declined to entertain the merits of a federal claim and specifically noted that "the issues of the rights of a '1983' action apparently are being determined in the federal court." (Ct. of Claims, App. p. 72a.) Thus, even if adequate in theory, the procedure and remedies of the state's claims court were clearly inadequate in practice to satisfy the remedial purposes envisaged by Congress in enacting Section 1983. In this regard it must be noted that although the Supreme Court has held that Congress has not barred state court power to hear Section 1983 cases, *Martinez* v. *California*, 444 U.S. 277, 283-284, n. 7 (1980), the Court has reserved the question whether states are obligated to entertain Section 1983 actions. *Maine* v. *Thiboutat*, 448 U.S. 1, 3, n. 1 (1980). Likewise, the Supreme Court of Ohio has not yet determined whether Section 1983 actions may be maintained in the state's Court of Claims.

Cooperman v. *University Surgical Association*, 32 O.S. 3d 191, 198, n. 2 (1987). This uncertainty renders even more problematic the application of a state waiver provision to effectively deny petitioner access to the only forum in which her Section 1983 cause of action could without reservation be heard.

Clearly, under the appellate court's decision, a federal court is barred from entertaining a meritorious Section 1983 claim regardless of whether a prior state proceeding affords a civil rights litigant a full and fair hearing. As a consequence, the appellate court's decision not only has worked a great injustice to a diligent civil rights litigant but, more importantly, has threatened the vital interests identified in *Monroe*, *Mitchum*, and *Patsy* in preserving federal courts as an available forum for the vindication of constitutional rights. To the extent that Section 1983 litigation will continue to be conducted in federal and state courts, the decision of the appellate court has significant implications for the private enforcement of constitutional rights in both these courts.

D. The Court of Appeals decision conflicts with decisions of other circuits as to the primacy of federal constitutional claims over state created remedies and procedures.

The Court of Appeals' decision subordinates to the operation of a state claims waiver provision a federal scheme of remedial legislation, 42 U.S.C. Section 1983, which is intended to vindicate fundamental rights, privileges and immunities secured by the Constitution. Application of the state waiver provision as a bar after the state claims court refused to entertain petitioner's federal claim effectively denied petitioner access to any forum in which to vindicate rights created and guaranteed by federal laws and the Constitution.

In ruling in the manner and for the reasons stated the Court of Appeals' decision contravenes the principle that

when courts are faced with the resolution of an inconsistency between state and federal law, the policy behind the federal law must be accorded priority. The crucial question in any such analysis, therefore, "is whether the application of state law would be inconsistent with the federal policy." *Robertson* v. *Wegmann*, 436 U.S. 584, 590 (1978) (quoting *Johnson* v. *Railway Express, Inc.*, 421 U.S. 454 (1975)).

United States courts of appeals have held that state remedial or regulatory schemes cannot stand in the way of federal civil rights actions and remedies. For example, in *Rosa* v. *Cantrell*, 705 F. 2d 1208 (10 Cir. 1982), *cert. denied*, 464 U.S. 821 (1983), the Tenth Circuit determined that plaintiff's acceptance of workers compensation benefits under state law could not bar her Section 1983 action in federal court. In that case, the exclusive remedy afforded by the State of Wyoming provided that receipt of workers compensation is "in lieu of all other rights and remedies against any other employee making contributions required by the act; or his employee acting within the scope of their employment unless the employee was culpably negligent." *Id.* at 1220. Nevertheless, the court stated:

> To allow defendants here to escape liability by relying on state law defenses certainly interferes with the basic social policy which favors the enforcement of federal civil rights and it would also interfere with the policy of preventing abuses of power by those acting under color of state law.

Rosa, supra at 1221; see also *McClary* v. *O'Hare*, 786 F. 2d 83 (2nd Cir., 1986) (court held that exclusivity provision of New York Workers Compensation Law did not bar widow of deceased employee from maintaining federal civil rights claim against employee under 42 U.S.C. Section 1983).

In other situations federal appellate courts have determined that state statutes which limit the scope or amount of damages recoverable under 42 U.S.C. 1983 are inconsistent with and superseded by that act. See e.g., *Jaco* v. *Bloechle*,

739 F. 2d 239 (6 Cir. 1984); *Bell* v. *City of Milwaukee*, 746 F. 2d 1205 (7th Cir. 1984); *Caperci* v. *Huntoon*, 397 F. 2d 799 (1st Cir.), *cert. den.*, 393 U.S. 940 (1968); *Mansell* v. *Saunders*, 372 F. 2d 573 (5th Cir. 1967); *Barista* v. *Weir*, 340 F. 2d 711 (3rd Cir. 1965). For similar reasons the Court of Appeals of the District of Columbia in *Brown* v. *U.S.*, 742 F. 2d 1498 (D.C. Cir. 1984), held that application of a state statute requiring notice to a municipality as a precondition to its liability under Section 1983 is inconsistent with the purposes underlying that Act and cannot therefore bar such claim.

In *Davis* v. *Wechsler*, 263 U.S. 22 (1927), this Court, long before the foregoing circuit cases, articulated virtually the identical principle so as to preserve the integrity of federal rights jeopardized by the interposition of state created defenses. At issue in *Davis* was whether a jurisdictional defense provided by federal law was waived by virtue of state procedural law governing the effect of a personal appearance to contest a matter on the merits. On that point, this Court ruled:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under name of local practice.

Id. at 23.

The rationale behind the foregoing principle is that state and local governments have no authority to place conditions for, add elements to, or set limits on federal causes of action. Any such efforts to do so are inconsistent with congressional intent in enacting such legislation. The Sixth Circuit's decision in this matter conflicts with the policy underpinned by the Supremacy Clause, of placing a primacy on the judicial protection of federally created rights. As a result, the Sixth Circuit's decision threatens a uniform federal jurisdiction policy that federal civil rights law supersedes state created remedies and procedures which stand "as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress." *Maryland* v. *Louisiana*, 451 U.S. 725, 746-47, 101 S.Ct. 2114, 2128-29 (1981).

Considering the constitutional significance of the rights affected by the waiver here and the conflict among the circuits with regard to the application of waivers to Section 1983 actions, this Court should grant certiorari to establish a uniform national jurisdictional policy regarding the effect of state waiver provisions on Section 1983 claims asserted in federal court.

II. SECOND QUESTION PRESENTED FOR REVIEW: SHOULD A DECISION OF A FEDERAL CIRCUIT COURT OF APPEALS TO HEAR A MATTER *EN BANC* BE VACATED WHEN A JUDGE WHO CAST AN OUTCOME DETERMINATIVE VOTE ON THE ISSUE OF *EN BANC* REVIEW RECUSES HIMSELF PURSUANT TO 28 U.S.C. § 455 FOLLOWING ORAL ARGUMENT ON THE MERITS?

A. The Court of Appeal's ratification of the vote to grant *en banc* review conflicts with the intent of the federal legislation governing disqualification.

This petition raises the question of whether a recusal by a Circuit Court Judge *in medias res* invalidates the Circuit Court's vote to grant *en banc* reconsideration of a District Court judgment which had been reversed by a decision of a panel of that court. The question is posed because the vote for *en banc* reconsideration reversing the panel decision was eight to seven in favor of review. After the *en banc* vote was taken and following oral argument on the merits, the judge who had voted in favor of reconsideration withdrew because the judge, as a state legislator, had drafted and sponsored the Ohio Court of Claims Act in question. At a conference, the Court declined to apply the recusal retroactively. The parties, however, were not afforded the opportunity to brief and argue the effect of the Judge's recusal.

With regard to recusal, 28 U.S.C. Section 455 provides in pertinent part, as follows:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the pro-

ceeding or expressed an opinion concerning the merits of the particular case in controversy.

Petitioner urges that where the vote of a recused judge is outcome determinative and the grounds for recusal pre-exist the judge's participation in the case, the intent and purpose underlying congressional enactment of 28 U.S.C. Section 455 governing the conduct of the federal judiciary requires that recusal operate retroactively.

Here the appellate court did not give the judge's recusal retroactive effect but determined instead to go forward with the proceedings *en banc* as a consequence of a vote taken after oral argument to "ratify" the decision to apply recusal prospectively only. Normally, as provided by statute, 28 U.S.C. Section 46(c), judges in regular active service "are largely free to devise whatever procedures they choose to initiate the process of decision to order such a rehearing, and to decide who may participate in those preliminary procedures." *Moody* v. *Albermarle Paper Company*, 417 U.S. 622, 626 (1974). Thus, the issue has been raised in this case of whether an appellate court's utilization of its power under 28 U.S.C. Section 46(c) to set in place machinery for determining whether to grant *en banc* review, *Albermarle*, supra at 624-25, citing *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247 at 250 (1953),[2] may supersede the purposes underlying 28 U.S.C. Section 455 governing disqualification of federal judges. This issue involving the interplay between an appellate court's *en banc* procedure and the recusal statute should be resolved by this Court in accordance with its general power in supervising the administration

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[2] While this Court has noted it is generally true that "voting on the merits of an *en banc* case is quite different from voting *whether to rehear* a case *en banc*," *Moody* v. *Albermarle Paper Company*, 417 U.S. 622, 627 (emphasis in original), that distinction is obscured where, as here, the decision to grant *en banc* review is determined by one vote which is later disqualified. Clearly, but for the decision to grant *en banc* review the panel decision reversing the judgment of the district court would have remained intact.

of justice in the federal courts, see *U.S.* v. *National City Lines*, 334 U.S. 573 (1948), so that the policies and procedures of the federal judiciary are uniformly applied throughout the federal system and in conformance with Congress' intent to foster confidence in the judicial system as a whole.

The legislative history of the present federal recusal statute reflects Congress' intent to take the recusal question out of the individual discretion of a judge. To accomplish that end, Congress in 1974 shifted the focus of 28 U.S.C. Section 455 from a subjective to an objective standard of what a "reasonable person knowing all the relevant facts would think about the impartiality of the judge." *Robert* v. *Barton*, 625 F. 2d 125, 129 (6th Cir. 1980); *Hall* v. *Small Business Administration*, 695 F. 2d 175, 179 (5th Cir. 1983). This shift to an objective standard requires that a judge recuse himself as soon as he becomes aware of a conflict. These provisions of the federal law are "mandatory and self-executing." *Liljeborg* v. *Health Services Administration Corp.*, 796 F. 2d 796, 802 (5th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S.Ct. 1368 (1987).

Consistency with this Congressional intent requires that recusal of a judge be given retroactive effect when the recused judge has participated in proceedings or decisions which are outcome determinative with respect to the case from which he has withdrawn.[3] When applied to Section 455 this means that recusal, to be meaningful, must be effective not on the date of actual recusal but when the judge's status, knowledge or background first becomes a disqualifying factor. Any other result would frustrate, if not totally defeat, the purpose Congress intended to be served by redrafting the statute to require automatic and immediate recusal upon the appearance of a conflict.

In two recent cases, the Court of Appeals for the Federal

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[3] The issue of the effect of a recusal on a prior judicial decision is a recurring one for which there is a need for guiding principles. See e.g. Advisory Committee on Code of Conduct, Advisory Opinion No. 71. (Dec. 14, 1981).

Circuit has interpreted 28 U.S.C. Section 455 so as not to require reversal of decisions on the grounds of recusal. In neither of these cases, however, did the recusal issue have an immediate bearing on an outcome determinative vote, either because the disqualifying factor occurred or arose after a final decision had been rendered and/or because the recusal did not have a substantial effect on the ultimate outcome. Thus, in *Maier* v. *Orr*, 758 F. 2d 1578 (Fed. Cir. 1985), the appellate court held that even if recusal of a panel judge who participated in a final decision was appropriate because the judge presiding over the military matter was a military retiree/annuitant, that fact would not form the basis of an attack on the decision itself. The court specifically noted that the two other panel members joined in the decision. In *Hodosh* v. *Block Drug Company*, 790 F. 2d 880 (Fed. Cir.), *cert. denied* 107 S.Ct. 106 (1986), the court ruled that vacation of a unanimous decision of an appellate court was not required where one of its members found out only after the decision the basis of his disqualification.

In other situations when a judge's impartiality has been challenged under Section 455(a) appellate courts have ruled that recusal operates prospectively only and does not invalidate prior judicial actions. These cases also do not address the problem created where a judge who casts an outcome determinative vote later recuses himself on the grounds of disqualifying status which pre-existed his vote. *See e.g. U.S.* v. *Widgery*, 778 F. 2d 325 (7th Cir. 1985) (judge was not disqualified under 455(b)(1) from ruling on post trial motions in criminal case where his knowledge of pre-existing facts came exclusively from trial); *U.S.* v. *Murphy*, 768 F. 2d 1518 (7th Cir. 1985), *cert. den.*, ____ U.S. ____, 106 S.Ct. 1188 (1986) (a criminal conviction will not be reversed because of an appearance of impartiality on basis of relationship between judge and prosecutor unless that relationship affected defendant's substantial rights to a fair trial).

However, the Supreme Court has recently granted certiorari in *Liljeborg* v. *Health Services Acquisition Corp.*, *supra.*

In this case, the Fifth Circuit ruled that a district court judge who acquired actual knowledge of the facts that the university on whose board of trustees he served had an interest in the outcome of the decision he rendered should have recused himself under 28 U.S.C. Section 455(a) to avoid any appearance of impropriety. Further, the circuit court held that the judge was chargeable with constructive knowledge of the disqualifying information thereby requireing that the original judgment entered by the judge be vacated. *Id.* at 802-03.

Liljeborg will present the question of whether a court granting a motion to recuse under 28 U.S.C. Section 455(a) based solely on an appearance of impartiality may set aside acts taken prior to filing that motion. While resolution of that case, therefore, will give at least a partial answer to the issue of the retroactive operation of recusal under 28 U.S.C. Section 455(a), it will not resolve the question of whether a ratification process can circumvent the intent and purposes of the disqualification statute where the recused judge has cast the tiebreaking vote to rehear a matter *en banc* and subsequently particiapted in oral argument on the merits.

Petitioner believes that this ratification process adopted by the Sixth Circuit pursuant to 28 U.S.C. 46(c) violates the principles of impartiality which the 1974 amendment of 28 U.S.C. Section 455 is intended to protect. This Court should grant certiorari so that it will be firmly established that policy decisions of judicial administration made by the various federal circuits may not run afoul of the purposes underlying the federal law of disqualification.

CONCLUSION

Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX A

No. 85-3471
UNITED STATES COURT OF APPEALS
For The Sixth Circuit

MARY KATE LEAMAN,
Plaintiff-Appellant,

v.

OHIO DEPARTMENT OF MENTAL RETARDATION & DEVELOPMENT DISABILITIES, ET AL.,
Defendants-Appellees.

Reargued November 12, 1986
Decided July 23, 1987

Ohio state employee brought action pursuant to, inter alia, civil rights statute, challenging her termination. Motion to dismiss was granted by the United States District Court for the Southern District of Ohio, Carl B. Rubin, Chief Judge, 620 F.Supp. 783, and employee appealed. The Court of Appeals, David A. Nelson, J., held that: (1) provision of Ohio Court of Claims Act that suit against the state under the Act waived any cause of action which plaintiff had against any state officer or employee provided for waiver of federal causes of action as well as causes of action based on state law, and (2) the waiver provision was not invalidated under the supremacy clause of the United States Constitution on theory that it thwarted the broad remedial purpose underlying the civil rights statute.

Affirmed.

Lively, Chief Judge, filed an opinion concurring in part and dissenting in part.

Keith, Circuit Judge, filed a dissenting opinion in which Nathaniel R. Jones, Circuit Judge, joined.

Circuit Judges Merritt, Boyce F. Martin, Jr., Nathaniel R. Jones and Milburn each delivered separate dissenting opinions.

Marc D. Mezibov, Cincinnati, Ohio, for plaintiff-appellant.

Deborah A. Piperni, Asst. Atty. Gen., Columbus, Ohio, Tim Mangan, Gene Holliker (argued), for defendants-appellees.

Before LIVELY, Chief Judge, and ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN and BOGGS, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

This is an appeal from a district court order (reported at 620 F.Supp. 783) in which Chief Judge Carl Rubin dismissed an action that Plaintiff Mary Kate Leaman, a former probationary employee of the Ohio Department of Mental Retardation, had brought against the department and certain of its officials for terminating her employment. The complaint alleged that the discharge violated 42 U.S.C. § 1983, 29 U.S.C. § 794 (the Rehabilitation Act of 1973), and the First and Fourteenth Amendments.

After suing the defendants in federal court, Ms. Leaman elected to file a virtually identical complaint in the Ohio Court of Claims against the Department of Mental Retardation alone. Judge Rubin then dismissed the federal action. As to the Department of Mental Retardation, the dismissal was based on sovereign immunity grounds. As to the individual defendants, Judge Rubin applied a provision of the Ohio Court of Claims Act that reads (in pertinent part) as follows:

> "Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee."

Ohio Revised Code § 2743.02(A)(1).

The judgment in favor of the department is not challenged here; what is contested is the district court's holding that by

electing to sue the department in the Ohio Court of Claims, the plaintiff voluntarily waived her cause of action against the individual defendants.

By divided vote, a three-judge panel of this court reversed the order dismissing the case against the individual employees. On petition for rehearing, eight of the fifteen active judges of the full court voted to rehear the case en banc, as authorized by 28 U.S.C. § 46(c), and an order was entered vacating the panel decision. After reargument, but before issuance of any final decision, one of the judges who had voted for the rehearing en banc recused himself from further participation. A question was then raised at an administrative meeting of the court as to whether the recusal ought to be deemed to relate back to the vote on the petition for rehearing. Chief Judge Lively ruled that the recusal was not retroactive. After discussion, and on motion duly made and seconded, the court voted, as the minutes of the meeting reflect, to "sustain the ruling of the chair and to ratify the action of the court in voting for en banc rehearing." Only three of the remaining fourteen judges voted against the motion.

This chain of procedural events has caused two members of the court serious concern. Before addressing the merits of the appeal and explaining why we believe the judgment of the trial court must be affirmed, therefore, we shall set forth the reasons why we do not consider it inappropriate for the full court to be deciding this case at this time.

I

The ruling of the Chief Judge on the retroactivity question, and the vote sustaining the ruling and ratifying the decision to rehear the appeal en banc, are consistent with the way in which at least one other circuit has dealt with the question of the retroactivity of recusals under 28 U.S.C. § 455(a). See *United States* v. *Widgery*, 778 F.2d 325, 328 (7th Cir. 1985); and *United States* v. *Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986), which teach that such recusals are pro-

spective only and do not invalidate prior judicial actions. Our decision to go forward with this proceeding en banc is also consonant with the Supreme Court's concept that voting on whether to rehear a case en banc "is essentially a policy decision of judicial administration," *Moody* v. *Albermarle Paper Co.*, 417 U.S. 622, 627, 94 S.Ct. 2513, 2516, 41 L.Ed.2d 358 (1974), and a policy decision as to which "each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 259, 73 S.Ct. 656, 662, 97 L.Ed. 986 (1953). The end to be served by such decisions " 'is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions. . . .' " *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 689-90, 80 S.Ct. 1336, 1339, 4 L.Ed.2d 1491 (1960) (quoting Maris, "Hearing and Rehearing Cases in Banc," 14 F.R.D. 91, 96 (1954)).

[1] If it makes any difference whether recusal was mandatory in this case, it bears emphasis that the mere fact of recusal does not mean that the recusing judge had concluded that his recusal was mandatory. Section 455(a) of Title 28 requires disqualification only where a judge's impartiality "might reasonably be questioned." Here the recusing judge, who as a member of the lower house of the Ohio legislature was a sponsor of the Ohio Court of Claims Act, has never believed that his role as a legislator could reasonably draw into question his ability to participate impartially as a judge in this case. We are not required to decide whether he is correct in this, but we note that his view is consistent with the practice of the late Chief Justice Fred Vinson and the late Justices Harold Burton and Hugo Black, who as members of the United States Supreme Court routinely sat on cases involving legislation passed while they were members of Congress.[1] The

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[1] See also *In the Matter of Thomas W. Sullivan*, 283 Ala. 514, 219 So.2d 346, 353, *cert. denied*, 396 U.S. 826, 90 S.Ct. 70, 24 L.Ed.2d 76 (1969), ("A judge is not disqualified to try a case because he had been a member of the

recusal statute has embodied an "objective" standard only since 1974, to be sure, and views on judicial mores do sometimes change over time—see, *e.g.*, Philip Elman's oral reminiscences on "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960," 100 Harv.L.Rev. 817 (1987)—but aside from *Limeco, Inc.* v. *Division of Lime*, 571 F.Supp. 710 (N.D.Miss. 1983), where a senior district judge recused himself from a case involving a bill for which he had voted as a legislator more than four decades earlier, we know of no published decision holding that the practice followed by Chief Justice Vinson and Justices Burton and Black is no longer permissible.

The plaintiff in this case did not move for recusal, moreover, notwithstanding that the judge who ultimately recused himself was on the bench throughout the oral argu-

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legislature enacting a statute involved in litigation before him, *Norton* v. *Lyon Van and Storage Co.*, 9 Cal.App.2d 199, 49 P.2d 311 [(1935), *cert. denied*, 298 U.S. 662, 56 S.Ct 746, 80 L.Ed. 1387 (1936)]"); *Williams* v. *Mayor & Council of the City of Athens*, 122 Ga.App. 465, 177 S.E.2d 581 (1970), (affirming denial of a motion to disqualify a judge on the ground that as city attorney he had drafted an ordinance the constitutionality of which was under attack in his court); and *Newburyport Redevelopment Authority* v. *Commonwealth*, 9 Mass.App. 206, 401 N.E.2d 118, 144 (1980) ("there is no merit to the committee's contention that the judge should have disqualified himself because he had been a member of the House of Representatives when St. 1967, c. 702, was enacted. . . . [T]he validity of that statute was and is a pure question of law. . . .").

Assuming that the recusing judge's sponsorship of the Ohio Court of Claims Act constituted a public expression of opinion on the constitutionality of the particular section of the law involved in this case, such an expression of opinion on a pure question of law in a context involving none of the parties to this case is comparable to a similar expression of opinion by a judge who has had occasion to address a particular question of law in a prior judicial opinion. Such expressions of opinion on legal issues are not disqualifying, any more than expressions of opinion on the merits of a case heard by a three-judge panel are disqualifying when the case is reheard en banc. Insofar as the case at bar may be thought to present a question of legislative intent, the recusing judge might well have considered the subjective intent of any individual legislator irrelevant, particularly in the absence of any legislative history illuminating that intent.

ment and notwithstanding that his sponsorship of the Ohio Court of Claims Act was a matter of public record. The plaintiff's failure to move for recusal could be considered to have some marginal significance, perhaps, insofar as it may suggest that the plaintiff herself did not consider recusal mandatory. Mandatory or not, however, the question is now academic; acting on his own motion, the judge did in fact recuse himself.

[2] Hardly less academic, in our view, is the question of retroactivity. There was no reason to ask the parties to brief the question of whether the recusal ought to have been deemed retroactive, because, by a large majority, the post-recusal court expressly ratified the vote for an en banc rehearing. What was ratified was not the ruling of the Chief Judge on the retroactivity question—that ruling was "sustained"—but the original action of the court in deciding that the case would be reheard en banc. Ratification, according to the common understanding, "is equivalent to a previous authorization and relates back to [the] time when [the] act ratified was done, except where intervening rights of third persons are concerned." Black's Law Dictionary (5th Ed. 1979). When an absolute majority of the full court, acting without the recusing judge, voted "to ratify the action of the court in voting for an en banc rehearing," it was voting *nunc pro tunc* to rehear the case en banc.

If there has been no such ratification, if the recusal had been deemed retroactive, and if the panel decision had been reinstated without the full court having decided whether the panel decision was correct, any victory the plaintiff might have won in the district court on remand would almost certainly have proved Pyrrhic. Without counting the recused judge, there are eight active judges of this court who now believe that the district court ruled correctly in dismissing the action. Barring a change in the composition of the court, there is no reason to suppose that on a second appeal the court would not again have voted to hear the case en banc. This would put us exactly where we are now, except that the litigants and their counsel and the trial court would all have

wasted a fair amount of time after the remand, and the litigants would have spent additional money, in order to get to a point where the full court of appeals would be prepared to say whether the district court reached the right result in dismissing the plaintiff's suit in the first place. We think the district court did reach the right result, and we see no common sense reason for postponing our decision on that question.

And so we turn to the merits of the appeal.

II

The Ohio Department of Mental Retardation hired Plaintiff Leaman as a case management specialist on December 12, 1983. Ms. Leaman was hired as a probationary employee whose appointment was not to become final, under Ohio Revised Code § 124.27, until she had satisfactorily served a probationary period fixed by regulation at 120 calendar days. Ms. Leaman's superiors did not consider her service satisfactory, and two of them signed a letter dated April 4, 1984, informing her that she was being removed from her position. The letter gave a number of reasons why it had been concluded that she could not meet the requirements of the job.

Ms. Leaman appealed her discharge to the State Personnel Board of Review, which dismissed the appeal. She then brought her federal court action, naming as defendants the Ohio Department of Mental Retardation and four of her superiors in the department. The complaint alleged that Ms. Leaman had been discharged, in violation of her rights under the United States Constitution and the federal Rehabilitation Act, because she had expressed disagreement with controversial departmental policies regarding mildly retarded juveniles. The complaint sought reinstatement with backpay, an award of costs and attorney fees, injunctive relief, and punitive damages of $25,000 against each individual defendant.

An essentially identical complaint, stripped of claims against the individual defendants, was later filed against the department in the Ohio Court of Claims. That court dismiss-

ed the complaint, holding in a final appealable decision that Ms. Leaman's discharge was in accordance with state law. The Court of Claims also held that a probationary state job does not constitute "property" protected under the Due Process Clause of the Fourteenth Amendment. The Court of Claims was unmoved by Ms. Leaman's First Amendment and Rehabilitation Act claims, which in that court's view confused the real issue:

> "By what ever name the claims are made, this court construes it as an appeal challenging the judgment and decision of the state agency. The court could visualize situations where every person terminated during a probationary period could claim that his First Amendment Right of 'free speech' has been violated. This court highly questions whether that is the intent of the First Amendment. As to the 29 U.S.C. 794 and 794(A) [sic], these deal with the rights of handicapped persons. To permit a probationary worker who has worked in her probationary position for less than 120 days, and who obviously disagreed with her superiors to state a cause of action . . . would, [in] this court's opinion, represent an entirely untenable position."

The Court of Claims commended, in conclusion, that a Section 1983 action appeared to have been brought in federal court "virtually contemporaneously," and the court confessed that it had "difficulty understanding why the case is pending in the Court of Claims involving the same issues and the same party, namely the State of Ohio," when the issues "apparently are being determined in federal court."

Under Ohio Revised Code § 2748.20 and Rule 4 of the Ohio Rules of Appellate Procedure, the decision of the Court of Claims could have been appealed to the Ohio Court of Appeals for the Tenth Appellate District by the filing of a notice of appeal on or before June 7, 1985. Judge Rubin dismissed the federal action on May 14, 1985, some three weeks before the deadline for appealing the decision of the Court of

Claims. Ms. Leaman did not appeal the Court of Claims decision, but did perfect an appeal to this court from the dismissal of her federal case.

Ms. Leaman contends that her filing of the Court of Claims suit could have had no adverse impact on her federal court action against the individual state employees, because the Ohio statute limited any waiver to claims arising under state law and because the statute itself made the waiver void in any event. In the alternative Ms. Leaman argues that the waiver provision is inconsistent with 42 U.S.C. § 1983, and may not be given effect because of the Supremacy Clause of the United States Constitution. We do not find either argument persuasive.

III

The Ohio Court of Claims Act waives the state's sovereign immunity and declares that the state consents to be sued in the Court of Claims. Like most laws that embody compromises among conflicting interests, the statute does not represent a total victory for the class of people who gained the most from its enactment. Under the statute, as we have seen, claimants who might wish to take advantage of the state's waiver of its sovereign immunity are put on notice that the waiver will be effective as to them only if they themselves waive any cognate claims they might have against the state's employees. And the statute tells prospective suitors in the Court of Claims that the waiver of cognate claims will be "a *complete* waiver of *any* cause of action . . . which the filing party has against any state officer or employee." Ohio Revised Code § 2743.02(A)(1) (emphasis supplied).

[3] The word "any," as used in the statute, is unambiguous. See *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986), holding that even under the strict construction accorded criminal statutes, the words "any court," as used in 18 U.S.C. § 922(h)(1), are "patently unambiguous" and do not exclude foreign courts. In providing that an election to sue the state in the Court of Claims results in a complete waiver

of any cognate cause of action against individual state officers or employees, the Ohio legislature clearly provided for waiver of federal causes of action, as well as causes of action based upon state law. United States District Courts for both the Northern and Southern districts of Ohio have so held (*Ferrari* v. *Woodside Receiving Hospital*, 624 F.Supp. 899, 902 (N.D. Ohio 1985); *Leaman* v. *Ohio Department of Mental Retardation & Developmental Disabilities*, 620 F.Supp. 783 (S.D. Ohio 1985)), and their interpretation is correct, in our view, assuming it does not result in a conflict with federal law. For reasons explained in the next section of this opinion, we see no such conflict.

[4] Ms. Leaman's principal argument that the waiver provision does not bar her federal action rests upon the final sentence of Ohio Revised Code § 2743.02(A)(1):

> "The waiver [of claims against individual state employees] shall be void if the court determines that the act or omissions was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner."

Ms. Leaman's federal complaint does not allege that the individual defendants who discharged her acted maliciously or outside the scope of their employment. Nonetheless, citing *Van Hoene* v. *State*, 20 Ohio App.3d 363, 486 N.E.2d 868 (Hamilton 1985) (where, despite the pendency of a suit in the Court of Claims, a complaint alleging that individual defendant employees had acted "with malicious purpose, in bad faith, or in a wanton or reckless manner" was held not to be demurrable), Ms. Leaman maintains that her allegation that the discharge was unconstitutional necessarily implies that the discharge was *ultra vires* and malicious.

Even if the complaint is construed as alleging what Ms. Leaman now says it implies, however, the statute voids the waiver only if "the court" determines that the individual defendants acted outside the scope of their employment or

maliciously. The words "the court" mean the Court of Claims. *Van Hoene, supra*, 486 N.E.2d at 872; *Smith* v. *Stempel*, 65 Ohio App.2d 36, 414 N.E.2d 445 (Franklin 1979), 3d Syl. In deciding, as it did, that the termination of Ms. Leaman's employment "was in accordance with the law," the Court of Claims can hardly be said to have determined that it was *ultra vires* or malicious.[2] This is dispositive of Ms. Leaman's claim that the waiver is void under the terms of the statute, and so we come to the question whether the waiver may be given effect under federal law.

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[2] It is true that the Court of Claims noted, merely "[b]y way of comment," that the department had been sued in a Section 1983 action the issues in which "apparently are being determined in a federal court." The Court of Claims had not seen the federal court complaint, was obviously unaware of the motion to dismiss the department on sovereign immunity grounds, and obviously did not intend to express any view on whether Ms. Leaman had waived her claims against individual state employees. The Court of Claims had no power to suspend the operation of the statute in any event.

Just as the Court of Claims did not address the waiver issue, neither does that court seem to have focused on the question whether its final decision that the Department had terminated Ms. Leaman's employment "in accordance with the law" would collaterally estop Ms. Leaman from asking another court to decide that the agents through whom the Department acted "in accordance with the law" somehow acted illegally as individuals.

Judge Merritt suggests, in his dissent, that "no meritorious § 1983 claim should ever be subject to the waiver," because, under Ohio law, conduct violative of § 1983 would always be *ultra vires* and thus could never subject the state to liability in a Court of Claims suit. We do not know whether the Supreme Court of Ohio would accept the premise of Judge Merritt's argument, but if the Court of Claims had accepted it in Ms. Leaman's case, and had held that the Department was not liable because its employees had acted against the law and thus outside the scope of their authority, under the express terms of the Ohio statute Ms. Leaman's waiver of her claims against the individual employees would have been "void." In fact, the Court of Claims held just the opposite; it held that the discharge was "in accordance" with the law, not against the law. Ms. Leaman did not choose to appeal that decision, and she might well have had to live with it even if there had been no waiver provision in the Ohio statute.

IV

[5] Ms. Leaman argues that application of the waiver provision of the Ohio Court of Claims Act "thwarted the broad remedial purpose underlying 42 U.S.C. Section 1983," and must therefore be invalidated under the Supremacy Clause of the United States Constitution. The argument relies heavily upon *Rosa* v. *Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983), which involved a Wyoming workers' compensation act that said that the rights and remedies provided in the act "are in lieu of all other rights and remedies. . . ." Wyo. Stat. § 27-12-103(a) (1977). Insofar as the Wyoming statute purported to bar recovery against a municipal employer under § 1983, *Rosa* v. *Cantrell* held that it was in conflict with § 1983 and had to yield to the federal statute under the Supremacy Clause.

Rosa v. *Cantrell* and comparable workers' compensation act cases are not controlling here, in our judgment, precisely because the workers' compensation acts purport to bar actions brought in another forum under another statute, while the Ohio Court of Claims Act does not. In no way does the Ohio statute shut the doors of the federal courts on claimants who are unwilling to forego suit there. It does not deprive claimants of their federal forum. The Ohio statute simply offers to make available an otherwise unavailable deep-pocket defendant, and an alternative forum, if prospective plaintiffs who think they have claims against individual state employees voluntarily elect to waive suit against the employees in favor of suit against the employer.

"The law is clear that . . . under the eleventh amendment, [states] are immune from [§ 1983] action[s] for damages or injunctive relief in federal court," *Abick* v. *State of Michigan*, 803 F.2d 874, 876 (6th Cir. 1986), and the Constitution does not require the State of Ohio to offer *any* waiver of its sovereign immunity. *Cf. Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). We see nothing inconsistent with § 1983 in the offer the state has made in its Court of Claims Act. The Ohio

statute gives claimants an option not otherwise available to them, and any claimant who does not like the statutory option is perfectly free to reject it and prosecute a § 1983 action against the state's officials just as if the Court of Claims Act had never been passed. Such an action may be maintained either in federal court or in an Ohio court of common pleas, without any necessity of filing an action in the Court of Claims. It is settled under Ohio law, moreover, that the Court of Claims Act would not prevent such a claimant from seeking declaratory or injunctive relief against the Department of Mental Retardation itself, again without any necessity of suing in the Court of Claims. *Friedman* v. *Johnson*, 18 Ohio St.3d 85, 87, 480 N.E.2d 82, 84 (1985); *Racing Guild of Ohio* v. *Ohio State Racing Commission*, 28 Ohio St.3d 317, 503 N.E.2d 1025 (1986), 1st Syl.

If in the case at bar the defendant officials had pleaded and proved an accord and satisfaction—if they had shown that Ms. Leaman had given them a written release of all claims in exchange for a monetary consideration—the defendants would surely have been entitled to a dismissal, and surely the dismissal could not be thought to frustrate the policy underlying § 1983. In practical effect the Ohio Court of Claims Act is a standing offer for a settlement of claims against state employees in exchange for an otherwise non-existent opportunity to sue the state itself for damages.

The constitutionality of such an offer can hardly be doubted in light of *Town of Newton* v. *Rumery*, 480 U.S. ____, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), where the Supreme Court, applying "traditional common-law principles" incorporated in federal law, 480 U.S. at ____, 107 S.Ct. at 1192, 94 L.Ed.2d at 415, held that a man who accepted a municipality's offer to dismiss criminal charges against him in exchange for a waiver of any claims he might have against the town and its officers could not repudiate the waiver and sue the town and its officers under 42 U.S.C. § 1983. The Supreme Court flatly rejected the argument that agreements such as that accepted by Mr. Rumery are "inherently coercive," and thus invalid per se; Mr. Rumery's

voluntary decision to accept the town's offer, the Court said, reflected "a highly rational judgment" that the obvious and certain benefits offered by the agreement would "exceed the speculative benefits of prevailing in a civil action [under § 1983]." 480 U.S. at ____, 107 S.Ct. at 1193, 94 L.Ed.2d at 417.

The inducement offered for Ms. Leaman's waiver (an opportunity to bring a direct action for damages against the State of Ohio) obviously lacked the potential for coercion inherent in the inducement (dismissal of criminal charges) offered for the waiver in *Rumery*. That being so, the benefits offered in the Ohio Court of Claims Act being no less "obvious" than those offered Mr. Rumery, and Ms. Leaman's election to accept Ohio's offer being no less "rational" than the election made by Mr. Rumery, we think the district court's decision to dismiss Ms. Leaman's case was even more clearly correct than the corresponding decision in Mr. Rumery's case.

In holding Ms. Leaman to her bargain, the district court clearly did not labor under the misapprehension that the voluntary waiver of a federal civil rights claim somehow amounts to a waiver of federal court *jurisdiction*. Under the terms of the Ohio statute, acceptance of the statutory offer results not in a waiver of federal jurisdiction to entertain suits against state employees, but in a waiver of "any cause of action" the waiving party may have against such employees. Where a claimant elects to sue the state in the Court of Claims, in other words, the state's employees are given an affirmative defense which the federal court has both the jurisdiction and the duty to recognize. This case did not present a situation in which the federal courts had been deprived of jurisdiction, any more than *Rumery* did; here, as in *Rumery*, the defendants were entitled to judgment not because the court had no jurisdiction, but because the plaintiff had no case.

Judge Rubin explicitly declared that the dismissal of Ms. Leaman's action was for failure to state a claim, as opposed to any want of jurisdiction:

> "In exchange for [waiver of her claims against officers and employees of the state], Plaintiff received a solvent Defendant. There being no statutory or constitutional impediment to such an arrangement, this Court will hold Plaintiff to her *quid pro quo* and dismiss the individual Defendants for failure to state a claim against them." *Leaman*, 620 F.Supp. at 786.

The *quid pro quo* received by Ms. Leaman was not illusory, and the bargain she accepted was not unfair. As this court has heretofore recognized, the Ohio Court of Claims Act does not constitute a waiver by the state of its sovereign immunity "with respect to actions pending in federal or other state courts." *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 681 (6th Cir. 1976), *cert. denied*, 430 U.S. 946, 97 S.Ct. 1583, 51 L.Ed.2d 794 (1977). Ohio was under no constitutional duty to let itself be sued at all, and it was not unreasonable for the state to tell prospective plaintiffs—in words not unlike those used by the United States itself in the Federal Tort Claims Act—"we will agree to let you sue the sovereign if you will agree to surrender your claims against the sovereign's servants." When one considers the depth of the sovereign's pockets in comparison to the depth of the servants', and when one remembers that Ms. Leaman was *not* required to give up her right to seek reinstatement through an injunction suit against the Department of Mental Retardation, it is hard for us to see how the state could possibly be thought to have been guilty of overreaching.

It is the reasonableness of the choice offered prospective plaintiffs like Ms. Leaman that prevents the Ohio Court of Claims Act from running afoul of the "unconstitutional condition" doctrine to which Mr. Justice Sutherland gave eloquent expression in *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926). There the State of California had told private truckers operating under private contracts of carriage that they could not use the public highways of the state unless they agreed to become common carriers. "In reality," the

Court said, "the carrier is given no choice, except a choice between the rock and the whirpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Id.* at 593, 46 S.Ct. at 607.

However one may assess the contrast between *Frost & Frost Trucking and Rumery*, bearing in mind that the choice offered Mr. Rumery was a choice between waiving his § 1983 claim and risking jail, the contrast between *Frost & Frost Trucking* and the case at bar is a striking one. Here Ms. Leaman was told that she could reject the offer made in the Court of Claims Act, suing the individual state employees for damages under § 1983 just as if the Court of Claims Act had never been passed at all, or she could choose to avail herself of an opportunity not available before the Court of Claims Act was passed—the opportunity to exchange her damage claim against the state's employees for a damage claim against the State itself. That, it seems to us, is a reasonable and meaningful choice; it is not a choice between "the rock and the whirlpool," and it bears no resemblance to the choice offered customers of the late Mr. Hobson or the offer that associates of Mr. Puzo's Godfather could not refuse.

The mere fact that the Ohio Court of Claims Act offered Ms. Leaman a choice not available to her before its enactment does not *ipso facto* make the Act unconstitutional, of course, and Ohio Revised Code § 2743.02(A)(1) no more puts justice on the auction block than does its counterpart in the Federal Tort Claims Act, 28 U.S.C. § 2676. Under federal law a tort claimant who wishes to sue the United States for damages under 28 U.S.C. § 1346(b) is put on notice by 28 U.S.C. § 2676 that any judgment in such an action will constitute "a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." If that provision of federal law does not sully the skirts of justice with the detritus of the marketplace, neither does the waiver provision of the Ohio Court of Claims Act.

A prospective federal tort claimant may choose not to sue

the United States itself, just as Ms. Leaman might have chosen not to sue the State of Ohio, and one who does not pursue his remedies against the federal government is not required to give up any claim he may have against the federal government's servants; but one who pursues his statutory remedies against the United States to the point of judgment—even an adverse judgment or a judgment for only a small part of the amount claimed—bars himself from any recovery against federal employees. Such a result has not struck this court or other federal courts as anomalous, even where the claim thus barred arises under the Constitution itself. *Serra* v. *Pichardo*, 786 F.2d 237 (6th Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 103, 93 L.Ed.2d 53 (1986); *Arevalo* v. *Woods*, 811 F.2d 487 (9th Cir. 1987). It is fair to say, moreover, that the Supreme Court of the United States has not always gone out of its way to interpret the Federal Tort Claims Act in favor of giving claimants a right to sue the government, even where the language of the Act itself might seem to provide a reasonably clear right of suit. *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950); *United States* v. *Johnson*, ____ U.S. ____, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987). Where the language of a governmental claims act appears to bar recovery against the government's servants, therefore, it seems unlikely that the Supreme Court would go out of its way to interpret the statutory language otherwise, as long as the right to sue the government itself is clear. As the Supreme Court recently had occasion to remind us, "[j]udicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what [the legislature] has plainly and intentionally provided." *Commissioner of Internal Revenue* v. *Asphalt Products Co., Inc.* ____ U.S. ____, 107 S.Ct. 2275, 96 L.Ed.2d 97 (1987).

[6] Under any interpretation, the Federal Tort Claims Act, like the Ohio Court of Claims Act, offers claimants a better deal than they would have without it. Neither statute forces any claimant to accept the government's statutory offer, and both statutes, far from requiring that any claimant's

constitutional rights be bartered away, afford claimants a superior mechanism for vindicating their rights. Constitutional rights may not be extinguished by any statute, state or federal, but this truism does not mean that suits or potential suits for alleged violations of such rights may not be compromised or waived. See *Home Insurance Company of New York* v. *Morse*, 87 U.S. (20 Wall.) 445, 451, 22 L.Ed. 365 (1874) (". . . any citizen may no doubt waive the rights to which he may be entitled"). And the long line of cases holding that a state may not require foreign corporations to surrender their right to remove actions against them to federal court as a condition of doing business within the state—a line that includes *Harrison* v. *St. Louis & San Francisco R.R. Co.*, 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621 (1914)—teaches nothing to the contrary, as the decision in *Rumery*, *supra*, confirms.

[7] It remains to be considered, however, whether the district court erred, in the case at bar, in finding that "[b]y filing in the Ohio Court of Claims, Plaintiff has made a knowing, intelligent, and voluntary waiver of her right to bring claims against officers and employees of the state." *Leaman*, 620 F.Supp. at 786. The finding that the waiver was "knowing, intelligent, and voluntary" presumably rests upon the fact that Ms. Leaman was represented by competent counsel when she filed her action in the Court of Claims, and counsel must be presumed to have known what the Court of Claims Act said. Under the circumstances of this case, we consider this an adequate foundation for the finding of voluntariness.

Ms. Leaman was not pleading guilty to criminal charges, or waiving her right to counsel in a criminal case, and it was not incumbent upon the court to make sure that her lawyer had adequately explained the effect of her action. Ms. Leaman was trying to recover a favorable judgment as a plaintiff. It was perfectly reasonable, in our view, to rely on Ms. Leaman's counsel for strategic advice on how best to accomplish that objective. See *Estelle* v. *Williams*, 425 U.S. 501, 512, 96 S.Ct. 1691, 1697, 48 L.Ed.2d 126 (1976), where,

notwithstanding that the party whose constitutional rights were waived was the defendant in a criminal trial, the Supreme Court declared, in holding habeas relief unavailable, that

> "[u]nder our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system."

Ms. Leaman's counsel must be deemed to have known that the price of suing the state in the Court of Claims would be the surrender of Ms. Leaman's punitive damage claims against her superiors in the Department of Mental Retardation, unless the Court of Claims could be persuaded that those individuals acted outside the scope of their employment or maliciously.[3] It was not the duty of any court to explore the adequacy of communication between client and counsel before permitting the complaint in the Court of Claims suit to be accepted for filing. And where a claimant represented by competent counsel has elected to accept Ohio's statutory offer to subject itself to suit in the Court of Claims in exchange for a waiver of claims against individual state officials, nothing in the Constitution entitles the claimant to repudiate the waiver if she or he loses the suit in the Court of Claims and does not even appeal the decision.

The judgment of the district court is AFFIRMED.

LIVELY, Chief Judge, concurring and dissenting.

I concur in that portion of the majority opinion holding that the decision of a judge of this court to withdraw from

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[3] The price seems small enough when one recalls that a finding of malice by the Court of Claims would have enabled Ms. Leaman to proceed with her punitive damage claims against the individuals — and absent malice, the claims had no merit anyway.

further participation in en banc proceedings following rehearing does not relate back and nullify that judge's earlier vote to rehear this case en banc. However, I dissent from the decision of the majority on the merits which affirms the district court's dismissal of this § 1983 case.

I.

The vote in favor of rehearing this case was 8 to 7, with all active judges voting. The judge who recused himself from participating in the en banc decision of this case did so shortly after oral argument on rehearing. He stated that he was recusing himself from "further" participation. The tentative vote of the court at conference was 8 to 7 in favor of affirming the district court, with the judge who subsequently filed the notice of recusal voting with the majority. His recusal left the court with an apparent tie vote. However, the vote at conference is always tentative. Another member of the en banc court notified all members of the court that he intended to change his conference vote from reversal of the district court judgment to affirmance. No other judge changed his or her vote, leaving the court split 8 to 6 for affirmance.

The matter was debated at a court meeting. Two alternatives were proposed. Several judges argued that the original vote to rehear the case was a nullity because the judge's later recusal should relate back and cancel his vote in favor of rehearing the case. Other judges argued that the case was properly reheard en banc and that the subsequent recusal of a judge had no effect on that judge's prior vote to rehear the case. The chief judge ruled that the later recusal did not nullify the recusing judge's prior participation in the en banc procedures. This ruling was upheld by an 11 to 3 vote and the case was assigned to a judge to prepare a proposed disposition. It was pointed out that every judge would have an opportunity to vote finally when the proposed opinion was circulated and to express disagreement with the resolution of the en banc procedural issue.

The en banc procedures of this court are controlled by statute (28 U.S.C. § 46(c) (1982)), a national rule (Rule 35,

Fed.R.App.P.) and a local rule (Rule 14, Rules of the Sixth Circuit). Several steps are involved in designating a particular case for rehearing en banc.

Either a party or any judge who would sit on the en banc court may "suggest" that a case is appropriate for rehearing en banc. Rule 35(b), Fed.R.App.P.; Rule 14(a), Rules of the Sixth Circuit. No action is taken on the suggestion unless a judge who is in regular active service or a judge sitting by designation who was a member of the panel that rendered the original decision requests a vote on the suggestion. Rule 35(b), Fed.R.App.P. When such a request is received, the active judges of the court vote by ballot, and a majority of all judges in regular active service must vote in favor of the request before rehearing en banc may be ordered. Rule 35(a), Fed.R.App.P.; 28 U.S.C. § 46(c). A vote to rehear a case en banc has the effect of vacating the previous opinion and judgment of the court, staying the mandate and restoring the case on the docket as a pending appeal. Rule 14(a), Rules of the Sixth Circuit. The court that rehears the case en banc consists of all circuit judges in regular active service and any senior circuit judge of the circuit who was a member of the panel whose decision is being reviewed en banc and who elects to participate. 28 U.S.C. § 46(c).

Since eligibility to participate in the various steps leading to rehearing en banc is not the same for each step, eligibility is determined by a judge's status at the time a particular step is reached. Thus, a judge who is in regular active service when a suggestion for rehearing en banc is made, but who was not on the panel whose decision is suggested for review, may request a vote. However, if that judge assumes senior status before the vote is taken he or she is not eligible to vote. Further, if the same judge retains active status during the vote, and assumes senior status after voting but before the rehearing is held, that judge is not eligible to participate in the rehearing. Recusals should be treated no differently. A judge who determines, for whatever reason, to refrain from participating at any stage of en banc proceedings withdraws as of that time. Recusal does not act retroactively to nullify the

judge's previous participation. Each stage of the en banc proceedings is distinct, and the requirements must be met serially. This case was properly reheard by the en banc court.

II.

I concur in Judge Merritt's dissent on the merits, and write separately to point out an additional basis for reversing the district court's dismissal of this action.

Ms. Leaman sought to vindicate First Amendment rights by bringing an action in federal district court under 42 U.S.C. § 1983. The four individuals that she charged with infringing her constitutional rights were her supervisors. She could not sue these persons in the Ohio Court of Claims. I do not believe Ohio could legally require Ms. Leaman to give up her right to seek relief from these individuals as a *quid pro quo* for taking advantage of the State's limited waiver of sovereign immunity that permits her to seek damages from the State in the Court of Claims.

The Eleventh Amendment prohibits federal court actions against states. However, the Supreme Court created a "fiction" in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which permits an injunction against a state official who has acted unconstitutionally, because an official so acting no longer represents the state. In this case Ms. Leaman sought prospective relief in the form of an injunction against continuation of unlawful conduct described in the complaint, reinstatement to her position, and other equitable relief in addition to damages. This equitable relief could be granted by a federal court without violating the Eleventh Amendment. *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The State's sovereign immunity would not be implicated by granting this relief against the individual defendants even though they were sued in their official capacities. *Id.* at 664, 94 S.Ct. at 1356. The fact that the Ohio Court of Claims provides a "deep pocket" for a plaintiff's demand for money damages is irrelevant. The state cannot prohibit the plaintiff from seeking the equitable relief

that is properly available in a federal court for infringement of her constitutional rights.

I would reverse the judgment of the district court.

KEITH, Circuit Judge, dissenting, joined by NATHANIEL R. JONES, Circuit Judge.

In this case, the majority exalts a state waiver provision above a plaintiff's right to seek relief for unconstitutional acts, rewards a litigant's diligent pursuit of 42 U.S.C. § 1983 remedies with total exclusion from a state *or* federal forum and characterizes the effect of its holding in terms of a simple contractual metaphor, as if Constitutional rights are bushels of wheat and the Constitution itself the Restatement (Second) of Contracts. I dissent.

Section 1983 permits an aggrieved citizen to seek relief in court for the unconstitutional acts of state or local government officials acting under color of state law. A cause of action under § 1983 is therefore not like a breach of contract action. The latter seeks a remedy for the violation of a contract between two discrete parties. The former, however, is predicated on a compact that does nothing less than allocate power between the government and the governed. Limitations by the government on a citizen's access to § 1983 relief must therefore be carefully scrutinized, since, by the very nature of a § 1983 action, the government is an interested party and the interests affected are of constitutional magnitude. The majority opinion fails to recognize this point. It subordinates the exercise of § 1983 relief for the "deprivation of any right, privileges, or immunities secured by the Constitution and laws" to the operation of a state claims waiver provision. In so doing, the majority deprives Ms. Leaman of any forum for her claims and does violence to the supremacy of federal law.

When courts are faced with the resolution of an inconsistency between state and federal law, the policies behind the federal law must be taken into account. The crucial question "is whether the *application of state law* would be incon-

sistent with the federal policy." *Robertson* v. *Wegmann*, 436 U.S. 584, 590, 98 S.Ct. 1991, 1995, 56 L.Ed.2d 554 (1978) (emphasis added) (*quoting Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975)). Such an analysis is particularly important when the application involves the waiver of federal rights, i.e., the right to file suit under § 1983. *Town of Newton* v. *Rumery*, ___ U.S. ___, ___, 107 S.Ct. 1187, 1192, 94 L.Ed.2d 405 (1987) *reversing and remanding* 778 F.2d 66 (1st Cir. 1985); *Robertson* v. *Wegmann; McGautha* v. *California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971); *Rosa* v. *Cantrell*, 705 F.2d 1208 (10th Cir. 1982).

In our analysis, therefore, the "purport" of the Ohio statute should not be at issue. We should not be concerned with the reasonableness of the waiver provision or the appropriateness of the Ohio state legislature's judgment on waiver of sovereign immunity. Rather, we should focus on the provision's "application in the face of a claim of civil rights guaranteed [the plaintiff] by federal law" *Robertson*, 436 U.S. at 600, 98 S.Ct. at 2000 (Blackmun, J., dissenting). Our analysis should balance the *policies* behind the federal law against the *application, in this specific case*, of the waiver provision.

With regard to Ms. Leaman, the most important policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law. *Robertson*, 436 U.S. at 591, 98 S.Ct. at 1995: Neither is furthered by the operation of Ohio's waiver provision. Ms. Leaman cannot be compensated because she no longer has a forum to pursue her constitutional claims, as a result of the district court's dismissal. She is being whipsawed, in effect, between the district court's dismissal and the Ohio waiver provision. Nor are Ohio state officials prevented or deterred from abusing state authority in violation of the Constitution. The operation of the waiver provision, as construed by the majority, effectively insulates those officials from the reach of any § 1983

claim, including Ms. Leaman's whenever a suit is filed in the Ohio Court of Claims.

These results cannot be those envisioned by Congress when it constructed the "broad sweep" of § 1983 and its companion civil rights statutes. *See Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The majority's analysis invites such mistaken outcomes, however, when it justifies the denial of the § 1983 remedy on the ground that Ms. Leaman "exchanged" the remedy for the right to sue the State of Ohio in its Court of Claims. Constitutional rights and their federal law remedies cannot be bartered or "exchanged", like so many bushels of wheat for so many dollars. Rather, they must be carefully scrutinized on a case-by-case basis. Such close scrutiny will insure that the fundamental values which the rights and remedies protect are not harmed by the unwise operation of a state's law. Most importantly, our highest function as judges is to uphold the Constitution. I cannot comprehend how that function is fulfilled when the very statute which permits the enforcement of Constitutional rights rises and falls on the contractual principle of accord and satisfaction.

The majority's opinion is part and parcel of an unwise tendency on this Court to narrow the § 1983 remedy to the point of nullity. We have held that § 1983 relief is not available for the deprivation of liberty or of property. *See Wilson* v. *Beebe*, 770 F.2d 578 (6th Cir. 1985) (Keith, J. dissenting in part, concurring in part). Now we find § 1983 relief to be conditioned on the operation of a state waiver provision. If this Circuit continues to follow the path it has started upon, there will be nothing left to § 1983. We will have stripped § 1983 of its basic fibre and meaning. That outcome may be comforting to some, but it is anathema to anyone who holds Constitutional rights dear. Hopefully, a higher and wiser court will correct the majority's decision.

MERRITT, Circuit Judge, dissenting.

This case involving the "waiver" provision of the Ohio Court of Claims Act raises two major questions. The first is

whether the Ohio statute should be construed so as to apply a waiver rule that would oust a federal court of federal question jurisdiction in civil rights cases. The second is whether a judge's decision to recuse himself in a case involving legislation which he drafted as a legislator arises only after the judge has voted to rehear the case en banc and then only as a matter of individual judgment. In my view, these questions must be answered in the negative.

The Court's opinion on the merits needlessly creates constitutional conflict with the unwarranted effect of limiting the jurisdiction of federal courts, and in its procedure validates or "ratifies" the actions of a conflicted judge in not exercising a mandatory legal duty of recusal prior to voting to rehear a case en banc. Substantively, the Court falsely frames the debate in terms of "marketplace" tradeoffs, a facile way of avoiding the important constitutional dimensions of the case. Procedurally, the majority would have us adopt a permissive attitude on recusal. I do not accept the Court's position: on the waiver issue, it undermines our system of separation of powers, and on the recusal matter, it could diminish public confidence in the integrity and independence of the federal judiciary. I therefore dissent.

I.

The Court proceeds erroneously on the premise that access to the federal courts can be bargained away by operation of the waiver provision in the Ohio statute. It posits a marketplace for adjudication where "[i]n practical effect the Ohio Court of Claims Act is a standing offer for a settlement of claims against state employees in exchange for an otherwise non-existent opportunity to sue the state itself for damages." Opinion of the Court at p. 953. Unfortunately, such a marketplace theory or metaphor for adjudication is contrary to a proper view of the federal jurisdiction firmly established in decisions of the Supreme Court.

The state legislature's use of the phrase "any cause of action" in its waiver provision does not mean that the state legislators should be held to have intended, or that the statute

should be read, to bar, withdraw or "waive" exercise of the *federal* judicial power in these cases. Without a real contract, a state cannot strike a figurative "bargain" with a prospective federal litigant and have such "contract" be enforceable in a federal court as a matter of law. The federal courts cannot be deprived of their jurisdiction in this manner.

In analyzing this case on the basis of marketplace metaphors rather than the required constitutional analysis, the Court creates unnecessary constitutional conflict when it permits the state statute to deprive the federal courts of their jurisdiction in civil rights cases. Acts of Congress such as 42 U.S.C. § 1983 and 28 U.S.C. § 1343 define the jurisdiction of the federal courts in civil rights cases, and the Constitution prevents the states from withdrawing or limiting federal jurisdiction by the adoption of waiver of election of remedies rules. As the Supreme Court stated in *Home Insurance Co.* v. *Morse*:

> The Constitution of the United States declares [in Art. 3, § 2] that the judicial power of the United States shall extend to all cases in law and equity arising under that Constitution, laws of the United States, and to the treaties made or which shall be made under their authority, . . . to controversies between a State and citizens of another State, and between citizens of different States.
>
> The jurisdiction of the Federal courts, under this clause of the Constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the Federal courts, *nor can it limit or restrict the authority given by Congress in pursuance of the Constitution*. This has been held many times.

87 U.S. (20 Wall.) 445, 453, 22 L.Ed. 365 (1874) (citations omitted) (emphasis added).

The reasoning in *Home Insurance* respecting Article III is

underpinned by the Supremacy Clause.[1] State limitations on federal jurisdiction are prohibited under this Clause where they frustrate laws passed by Congress that contain express grants of federal jurisdiction, such as the federal civil rights statutes. The Supremacy Clause is particularly relevant in the federal civil rights context in light of the clear congressional desire to empower the federal courts in this area. This congressional intent is reflected in the legislative history of the antecedent to § 1983. *See Patsy* v. *Bd. of Regents*, 457 U.S. 496, 502-507, 102 S.Ct. 2557, 2561-2563, 73 L.Ed.2d 172 (1982).

In a long line of cases, the Supreme Court had invalidated state requirements that foreign corporations surrender their right to remove cases to federal courts as a condition of doing business within the state. In *Harrision* v. *St. Louis & San Francisco Railroad*, 232 U.S. 318, 328, 34 S.Ct. 333, 335, 58 L.Ed. 621 (1914), the Supreme Court framed the issue as follows:

> It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress, pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not be any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it.

Accord Terral v. *Burke Constr. Co.*, 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352 (1922); *Donald* v. *Philadelphia & Reading*

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[1] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

Coal and Iron Co., 241 U.S. 329, 36 S.Ct. 563, 60 L.Ed. 1027 (1916); *Home Ins. Co.* v. *Morse*, 87 U.S. (20 Wall.) 445, 22 L.Ed. 365 (1874); *see also Payne* v. *Hook*, 74 U.S. (7 Wall.) 425, 19 L.Ed. 260 (1868) (state cannot defeat federal jurisdiction by confining jurisdiction of issue to specialized state court).

The Court attempts to evade the obvious Supremacy Clause problem posed by such a divestiture of federal jurisdiction by arguing that the statute creates an implicit waiver "contract."[2] Although under appropriate circumstances an individual may release her § 1983 claims by written contract, it is impermissible for a state to create a statutory framework which *automatically* operates to waive federal jurisdiction. *See Town of Newton* v. *Rumery*, ____ U.S. ____, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) (written waiver valid in certain circumstances). The Supreme Court is clear and explicit that "waiver" of § 1983 claims "is a question of federal law." *Town of Newton*, 107 S.Ct. at 1192. There may also be a presumption against an individual's "waiver," even when executed by written release, which serves to limit the power of the federal courts. *See id.* at 1205 (Stevens, J., dissenting); *see also id.* at 1196-97 (O'Connor, J., concurring) (defendant bears burden of proving that contract of waiver voluntarily made).

The Court states that the federal court has a duty to recognize the affimative defense supposedly created by the Ohio statute. This affirmative defense apparently flows from an implicit waiver contract created by the statute. While the federal courts may recognize waiver contracts to limit an individual's right to bring a § 1983 claim in certain limited circumstances, five members of the Supreme Court in *Town of Newton* emphasized that at a minimum the waiver

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[2] The Court also argues that the existence of a similar provision in the Federal Tort Claims Act removes constitutional doubt from the Ohio statute. Opinion of the Court at p. 955. This position taken by the Court ignores the fact that the problem posed by the Ohio statute stems from the Supremacy Clause — a concern not implicated by Congressional action.

agreements are subject to strict requirements that they be entered into knowingly, intelligently and voluntarily, and that the burden is on the defendant to prove the waiver in question meets this strict requirement.

We emphasize that here there is no written waiver contract, and the "waiver" is by operation of state law; hence this case is more problematic than that presented in *Town of Newton*. The problems presented by the court's interpretation of the Ohio scheme resemble those of classic contracts of adhesion: by entering the doors of the Ohio Court of Claims, the claimant automatically becomes a party to an agreement which the claimant may not know of or accept.

The scheme of automatic waiver proposed by the Court does not comport with the strict requirements for waiver set forth in *Town of Newton* and the mere fact that Ms. Leaman was represented by counsel cannot save it. A written contract serves as evidence that a litigant's decision to waive federal jurisdiction was entered into with some reflection as to its benefits and detriments. There is no such evidence here; in fact, the record indicates that all parties concerned — including the state judge — understood that her claim *would* be heard by a federal court. As the Supreme Court stated half a century ago, "we do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel.* v. *Public Utilities Comm'n*, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093 (1937). Moreover, as to fundamental rights, "courts indulge every reasonable assumption against waiver." *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937).

It may be true in a diversity case after *Erie* that the doors of the federal courts are closed to state claims if the state would not entertain the claim, but a *federally*-created right should be heard in federal court even if the state has closed its doors to the parties. *Angel* v. *Bullington*, 330 U.S. 183, 192, 67 S.Ct. 657, 662, 91 L.Ed. 832 (1947). The reason for this rule is that otherwise a state would be able to obstruct and frustrate the obligations created by federal law. For example, in the workers' compensation area, courts have looked

askance at exclusive remedy provisions interfering with federal constitutional claims. As the court stated in a § 1983 action, "[t]o allow defendants here to escape liability by relying on state law defenses certainly interferes with the basic social policy which favors the enforcement of federal civil rights and it would also interfere with the policy of preventing abuses of power by those acting under color of state law." *Rosa* v. *Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied*, 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983); *see also McClary* v. *O'Hare*, 786 F.2d 83 (2d Cir. 1986).

We should thus decline to interpret the state statute in question here to create an implicit waiver contract that a federal court would have a duty to recognize. A prospective federal litigant cannot be derprived of the right to pursue a federal cause of action to vindicate constitutional rights by automatic operation of a state statute. We must therefore examine how the Ohio statute operates in practice to determine whether the waiver provision actually serves to limit federal jurisdiction in violation of the Supremacy Clause.

II.

The Court reads the state statute in a fashion that is inconsistent with interpretations rendered by the Ohio courts, and thus creates a needless conflict with the Supremacy Clause. Under Ohio law, it is not clear that a § 1983 action would ever trigger the Ohio waiver provision. Rather, rulings from the Ohio courts indicate that the constitutional violations which form the basis for the § 1983 action would be outside the scope of employment and therefore not waived. There is therefore no actual conflict between the Ohio law and federal jurisdiction.[3]

Ohio case law is clear that merely filing a Court of Claims suit does not create an irrevocable waiver under Ohio Rev.

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[3] In footnote 2 of its opinion, the Court concedes that if constitutional violations sufficient to form the basis for § 1983 claims are deemed by the Ohio courts to be outside the scope of employment, there would be no waiver and therefore no conflict between the Ohio statute and federal jurisdiction.

Code Ann. § 2743.02(A)(1) (Baldwin 1986). Rather, the waiver becomes inoperative when the Court of Claims determines that "the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code Ann. § 2743.02(A)(1) (Baldwin 1986); *McIntosh* v. *University of Cincinnati*, 24 Ohio App.3d 116, 120, 493 N.E.2d 321, 324-25 (1985).

The Ohio courts have so narrowly defined the scope of employment for public employees that no meritorious § 1983 claim should ever be subject to the waiver. In *Berke* v. *Ohio Department of Public Welfare*, 52 Ohio App.2d 271, 273, 369 N.E.2d 1056, 1058 (1976), the Court held that it is "clearly ultra vires" for a state employee to discriminate because of sex, religion, or national origin. In *Tyus* v. *Moritz*, 52 Ohio App.2d 143, 145, 368 N.E.2d 846, 848 (1976), the Court held that "any negligence, slander, or medical malpractice would plainly not be within the scope of supervision or within the scope of authority . . . [and] would be ultra vires by such employees." In an unpublished decision, another Ohio appellate court observed that jurisdiction in the Court of Common Pleas is proper when the alleged conduct "is intentionally tortious and therefore outside of the scope of the state employee's employment." *Shaw* v. *Greene*, No. CA85-07-041 (Ohio App., May 27, 1986) (Westlaw, OHCS database, at 4). Given the type of conduct excluded from the scope of employment in the foregoing cases, no meritorious § 1983 claim should be subject to the waiver provision of Ohio Rev. Code Ann. § 2743.02(A)(1) (Baldwin 1986).

As long as Ohio maintains its restrictive view of the scope of public employment, the only source of conflict between federal and state courts in this case is the normal friction caused by concurrent jurisdiction. The mere existence of concurrent jurisdiction is not itself a problem since § 1983 suits may be brought in state court. The question is whether Ohio's assertion of jurisdiction actually conflicts with federal law.

Again, we look to Ohio's interpretation of its own statute to determine the extent of any conflict.

When concurrent suits are filed in the Court of Claims and the Court of Common Pleas, the State of Ohio has instructed the latter tribunal to stay its proceeding until the court of Claims rules on the scope of employment issue. *McIntosh* v. *University of Cincinnati*, 24 Ohio App.3d at 120, 493 N.E. 2d at 324-25; *Smith* v. *Stempel*, 65 Ohio App.2d 36, 41-42, 414 N.E.2d 445, 449 (1979). A federal court could reach the same result under well-established principles of abstention. *See England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Thus, there is no conflict in this instance between the state and federal law that coordinates the disposition of concurrent suits.

III.

The final question raised by this case concerns what effect a federal court will give a prior Court of Claims' determination on scope of employment. As a legal matter this question is hardly novel. For almost 200 years the federal courts have developed principles of res judicata and collateral estoppel in order to accommodate dual federal and state jurisdiction. This is the body of legal principles that we should use to resolve the present dispute, instead of an analysis that relies on a feather's weight of Ohio authority and a misplaced marketplace metaphor.

In footnote 2 of its opinion, the Court states that there was no waiver in this case because the Court of Claims held that the "discharge was in accordance with the law, not against the law." The Court seems to ignore the fact that before any such "finding" by the Court of Claims can have preclusive effect in this action, it must be judged by principles of res judicata and collateral estoppel.

Under res judicata, or claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). The related doctrine of col-

lateral estoppel, or issue preclusion, dictates that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.*; *see also id.* at 94 n. 5, 101 S.Ct. at 415 n. 5 (citing Restatement (Second) of Judgments § 74 (Tent. Draft No. 3, Apr. 15, 1976) for use of term "claim preclusion" as equivalent to res judicata and "issue preclusion" for collateral estoppel).

Collateral estoppel cannot apply, however, unless the party against whom the earlier decision is asserted had a "full and fair opportunity" to litigate the issue in the earlier case. *See Haring* v. *Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983); *Allen* v. *McCurry*, 449 U.S. at 95, 101, 101 S.Ct. at 415, 418; Restatement (Second) of Judgments § 29 (1982). The rationale behind claim and issue preclusion is to relieve the parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and to encourage reliance on adjudication by preventing inconsistent decisions. *See Allen* v. *McCurry*, 449 U.S. at 94, 101 S.Ct. at 415 (citing *Montana* v. *United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979)).

Congress has passed legislation which requires federal courts to give preclusive effect to state court judgments. The Constitution's Full Faith and Credit Clause[4] is implemented by the federal full faith and credit statute, 28 U.S.C. § 1738 (1982). The statute provides in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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[4] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S.Const., Art. IV, § 1.

It is now well-settled that this requires federal courts to give the same preclusive effect to state court judgments "that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982); *see also Haring* v. *Prosise*, 462 U.S. at 313, 103 S.Ct. at 2373.

In the absence of federal law modifying the operation of § 1738, the preclusive effect of a prior state court judgment is therefore determined in the first instance by state law. The Supreme Court has repeatedly held that § 1983 does not operate to modify the application of § 1738 as to either claim or issue preclusion. *See Migra* v. *Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (claim preclusion); *Allen* v. *McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (issue preclusion); *see also University of Tennessee* v. *Elliot*, ____ U.S. ____, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (although § 1738 not applicable, federal common law operates to require federal courts to give agency's fact-finding preclusive effect in § 1983 action when agency acting in judicial capacity).

An analysis of res judicata or collateral estoppel by a prior state court proceeding in a federal § 1983 action must thus begin with a consideration of whether relitigation of the issue or claim would be barred under state law. Secondly, federal law then provides a check on the state process by requiring that the party against whom the earlier decision is asserted has had a "full and fair opportunity" to raise or litigate the issue decided by the prior state court litigation. *See Haring* v. *Prosise*, 462 U.S. at 313-14, 103 S.Ct. at 2373; *Allen* v. *McCurry*, 449 U.S. at 95, 101, 101 S.Ct. at 415, 418.

Applying this analysis to the facts of our case, we must first decide whether Ms. Leaman's claim against the individual defendants would be barred in a later proceeding in the Ohio courts under applicable doctrines of res judicata and collateral estoppel. The standard for determining when the doctrine of res judicata applies to Ohio litigants is as follows: "A *final judgment* rendered by a court of *competent jurisdiction*

on the merits is conclusive as to the *rights of the parties* and, *as to them*, constitutes an absolute bar to a subsequent action involving the same cause of action." *State ex rel. Cartmell* v. *Dorrian*, 11 Ohio St.3d 177, 178, 464 N.E.2d 556, 558-59 (1984) (emphasis added). In the context of this case, the Court of Claims did not have jurisdiction to render judgment against the individual defendants.[5] *See* Ohio Rev. Code Ann. § 2743.02(E) (Baldwin 1986); *McIntosh* v. *University of Cincinnati*, 24 Ohio App.3d 116, 117 n. 4, 493 N.E.2d 321, 322 n. 4 (1985). Accordingly, Ms. Leaman's § 1983 claims against the individual defendants are not barred by res judicata.

Collateral estoppel, on the other hand, applies to preclude the redetermination of issues which have been decided by an earlier tribunal after giving the parties a full and fair opportunity to litigate their claims. A fair reading of the Court of Claims decision makes it clear that it did not decide Ms. Leaman's federal claims at all. The Court of Claims expressly stated that "[t]he issues of the rights of a '1983' action apparently are being determined in a federal court." *Leaman* v. *Ohio Dept. of Mental Retardation and Developmental Disabilities*, No. 84-09161, slip op. at 9 (Ohio Ct.Cl. May 8, 1985) (Joint Appendix at 61, 74 Civ.Actions J. 144). From this statement, it is obvious that Ms. Leaman was given no opportunity whatever — much less a "full and fair opportunity" — to litigate her federal claim against the individual defendants. Principles of collateral estoppel, therefore, do not bar litigation of her § 1983 claims in a federal forum.

Under our view of the Supremacy Clause and basic principles of federal jurisdiction, the only doctrine which may validly bar Ms. Leaman from litigating her § 1983 claims in a federal court are those of res judicata and collateral estoppel.

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[5] The Courts of Claims statute does provide a method by which the state could implead individual officers as third-party defendants. Ohio Rev. Code Ann. § 2743.02(E) (Baldwin 1986). However, since the state did not do so in this case, the individuals were not properly before the court. Accordingly, the Court of Claims did not have jurisdiction to render judgment against the individuals.

Since neither of these doctrines apply in this case, Ms. Leaman should be permitted to proceed with her § 1983 action against the individual defendants in federal forum.

IV.

Although I have addressed the merits of this case, there is a valid question as to whether the merits should have been reheard en banc in light of the recusal problem. The vote for en banc review of the panel decision was 8 to 7 in favor of review. After the en banc vote was taken, a judge who had voted in favor of reconsideration then recused himself from the case. As the Republican whip in the Ohio legislature, he drafted and co-sponsored the act in question.

The issue presented is whether the recused judge's vote that caused the rehearing en banc should be counted. At a conference on January 28, 1987, the Court voted to continue the en banc proceeding unabated without allowing the parties the opportunity to brief and argue the effect of this recusal. I disagree with the Court on this procedure. If the recusal issue had been properly addressed, the Court would have to conclude that there were not enough votes for en banc review and the panel decision would stand.[6]

Under the rules of our circuit, a majority vote of all active judges of the court to rehear a case en banc automatically vacates the panel decision of the court. If the recused judge disqualifed himself when the petition for rehearing en banc was first circulated, the rehearing would not have been granted and the panel decision would have remained in ef-

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[6] The Court purports to cure its defect in procedure through a process of "ratification." The Court states at page 948 of its opinion that at an administrative meeting the full court "ratified" the decision to grant rehearing en banc. However, the record of the administrative meeting indicates that what was "ratified" was a motion to sustain the ruling of the Chief Judge that the recusal was not retroactive and therefore the en banc vote should not be disturbed. Such a motion is no substitute for a straight up-or-down vote on whether to grant en banc review. If there were to be a new vote on the question of en banc review, then the vote should be taken in accordance with the rules of the Court and not confused with another matter. *See* Court Policies Section 11.6.

fect. This is because only seven judges would have favored rehearing, and seven of fifteen obviously does not constitute a majority of the court.[7]

A judge's duty to recuse himself is governed by federal statute. The federal recusal statute provides in pertinent part:

> Any justice, judge, or magistrate of the United States *shall* disqualify himself in *any proceeding* in which his impartiality might *reasonably be questioned.*

28 U.S.C. § 455(a) (1982) (emphasis added). The term "proceeding" is defined in the statute to include the various stages of litigation including appellate review. 28 U.S.C. § 455(d)(1) (1982). The term "proceeding" within the meaning of § 455(a) should be interpreted to encompass a judicial proceeding in which judges vote on whether to vacate a panel decision by granting en banc review. Since a judge's vote on a petition to rehear may be outcome-determinative, as amply demonstrated in this cae, it is inconceivable that official action on the motion would not be covered by the statute. As the Fourth Circuit has stated on this same question, "patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred." *Arnold* v. *Eastern Air Lines*, 712 F.2d 899, 904 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed. 2d 168 (1984). Accordingly, the judge's vote in this case falls within the ambit of the statute.

The test for whether recusal is required by the federal statute is what a "reasonable person knowing all the relevant

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[7] In *Clark* v. *American Broadcasting Companies*, 684 F.2d 1208, 1226 (6th Cir. 1982), this Court decided that when a judge disqualifies himself from a petition to rehear, that judge is nonetheless counted as a judge sitting in "regular active service" within the meaning of Rule 35(a) of the Federal Rules of Appellate Procedure. Applying more sound reasoning, other circuits have adopted a rule for tabulating rehearing votes which excludes the disqualified judge from the denominator of the fraction. *See, e.g., Arnold* v. *Eastern Air Lines*, 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984).

facts would think about the impartiality of the judge." *Roberts* v. *Bailar*, 625 F.2d 125, 129 (6th Cir. 1980); *see also United States* v. *Norton*, 700 F.2d 1072, 1076 (6th Cir.), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1885, 76 L.Ed.2d 814 (1983); *Hall* v. *Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) ("reasonable person, knowing all the circumstances, would harbor doubts about his impartiality"). The *Roberts* case holds further that "[e]ven where the question is close, the judge whose impartiality might reasonably be questioned *must* recuse himself from the trial." 625 F.2d at 129 (emphasis added).

The legislative history of the recusal statute reinforces our view of the mandatory duty imposed on the conflicted judge. The issue is one of law which does not depend on the discretion or the conscience of the individual judge or the collegial feelings of the Court. As this Court explained in *Roberts*, "To promote public confidence in the impartiality of the federal judicial system, the Congress in 1974 shifted the focus of § 455" from a subjective to an objective standard. 625 F.2d at 129. The congressional committee report accompanying the 1974 change in the recusal statute stated that the new statute "sets up an objective standard, rather than the subjective standard set forth in the existing statute through the use of the phrase 'in his opinion.' " *Judiciary—Disqualification of Judges*, H.R.Rep. No. 1453, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.Code Cong. & Admin. News 6351, 6354-55. As part of its effort to promote public confidence in the judiciary, Congress enacted the current statute with the express purpose of taking the recusal question out of the individual discretion of the judge, a point the majority fails to recognize by citing with approval judicial practice prior to the recusal statute's amendment.

It is obvious that the recused judge's involvement as drafter and co-sponsor of the Ohio bill now under attack in this litigation *requires* his recusal from this entire proceeding, including his vote on the petition to rehear en banc. The recused judge's position here is even more conflicting than the situation faced by Judge Keady in a case arising after the 1974

amendment of the recusal statute.[8] *Limeco, Inc.* v. *Division of Lime*, 571 F.Supp. 710 (N.D.Miss 1983). In that case, Judge Keady voted against a bill in the state legislature forty-one years earlier which had created the defendant, a state-owned agency. Despite his minor involvement and the passage of four decades, Judge Keady felt compelled to recuse himself from the litigation. Even though the litigation had been proceeding for two years before the conflict was brought to Judge Keady's attention, Judge Keady recused himself as soon as he became aware of the conflict.

In his recusal order, Judge Keady noted that his vote in the state legislature forty-one years earlier was a sufficient expression of his opinion on the case before him to call his impartiality into question. Judge Keady explained his recusal decision as follows:

> Judicial ethics "exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct." *Hall* v. *Small Business Administration*, 695 F.2d 175, 176 (5th Cir. 1983).

Limeco, 571 F.Supp. at 711.

Unlike Judge Keady in *Limeco*, the recused judge here did not merely vote on a bill — he recently drafted and cosponsored the legislation under constitutional attack in this litigation. This judge has recognized a conflict of interest that has prompted him to recuse himself. This recusal decision is correct under decisions of this Court. The only issue is whether he should have recused himself earlier — *i.e.*, before voting to rehear the case en banc. Since it is undisputed that the recused judge was aware of this conflict at the time he voted for rehearing the case en banc, he should have disqualified himself prior to that vote. Recusal is *required* as soon as a

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[8] It should be emphasized that this is the only decision cited in any opinion in this case with similar facts to ours decided after the 1974 amendment to the statute; yet, the Court cites *Limeco* without distinguishing it.

judge is aware of conflict. *See Health Services Acquisition Corp.* v. *Liljeberg*, 796 F.2d 796 (5th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987); *United States* v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986). No motion is required from the parties to effect a recusal. *See Liljeberg*, 796 F.2d at 802 (Provisions of § 455(a) "mandatory and self-executing" upon appearance of partiality).

The Court relies on the practice of a few Supreme Court justices to argue that the current case does not present a recusal problem. In the case before us we are required to construe and apply the federal recusal statute, and I do not believe the Court's invocation of past practice constitutes legal precedent on which we can rely. The fact that Chief Justice Vinson and Justices Burton and Black did not recuse themselves in cases involving legislation passed during their tenure in Congress is irrelevant: this practice does not constitute precedent. There is no federal case authorizing a federal judge to hear the constitutionality of a statute he drafted and sponsored in the legislature. Moreover, as discussed in the legislative history to the statute, it is clear that Congress in enacting the current statute intended to impose a more stringent standard than had previously existed — a point the Court itself concedes at pages 949-950. *See supra* pages 966-967. Therefore, for these reasons, the actions of the justices named by the Court are not precedent for the action approved here. Furthermore, I find the Court's citation of state case law to be irrelevant in construing and applying the *federal* recusal statute.

My concern with recusal in the present case rests fundamentally on separation of power considerations. Indeed, such considerations can be traced to the Constitutional Convention of 1787 where there was deliberation on a proposal to form a "Council of Revision" to review and approve or disapprove acts passed by the national and state legislatures. The proposal provided for membership on the Council by "the Executive and *a convenient number of the National Judiciary.*"

1 M. Farrand, *The Records of the Federal Convention of 1787* 21 (1937 rev. ed) (1966 ed., 2d printing 1974) (emphasis added).

Although endorsed by such delegates as James Madison of Virginia, several delegates voiced opposition to the plan to include members of the judiciary as part of the Council of Revision. Rufus King of Massachusetts proposed delay of the consideration of the Council plan, "observing that the *Judges ought to be able to expound the law as it should come before them, free from the bias of having particiapted in its formation.*" *Id.* at 98 (emphasis added). John Dickenson of Delaware also expressed concern over an "improper mixture of powers." *Id.* at 140. Elbridge Gerry of Massachusetts doubted "whether the Judiciary ought to form a part of it, as they will have a sufficient check [against] encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality." *Id.* at 97.

The same kind of concern that we have about the participation of the recused judge in the case before us — that judges should be "free from the bias of having participated in [the law's] formation" — led the Constitutional Convention to reject overwhelmingly the "improper mixture" of judges and politicians in the Council of Revision.

Accordingly, I dissent.

BOYCE F. MARTIN, Jr., Circuit Judge, dissenting.

In my view, absent another vote on whether to grant a rehearing en banc, this dispute must be resolved on the merits. I disagree with the interpretation of Rule 35(a) of the Federal Rules of Appellate Procedure found in the order issued in *Clark* v. *American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1226 (6th Cir. 1982), however until there is a new decision by the full court, we are bound by our precedent.

I disagree with the majority on the merits. The state statute involved, Ohio Revised Code § 2743.02(A)(1), states that a

civil action filed in the Court of Claims waives any other cause of action against a state officer or employee based on the same act or omission. If read literally I think the statute improperly restricts the jurisdiction of a federal court to entertain a cause of action under section 1983. Consequently, it is my opinion that the statute must be construed as waiving state created claims only, not federally created causes of action such as Leaman's. In any event, Leaman cannot be said to have waived access to federal court unless it is clear she was aware that she had two avenues available for raising her section 1983 claim. The record before us is devoid of any information which would assist in making a valid decision on this point.

I would reverse the judgment of the district court and remand the case for further proceedings.

NATHANIEL R. JONES, Circuit Judge, dissenting.

I concur fully in Judge Keith's dissent on the merits of this case. This court is obviously and painfully split over the integrity of section 1983 and the import of the constitutional rights that the Civil Rights Act seeks to protect. From my dissenter's perch, it is small solace that even Mr. Justice Sutherland recognized the folly of constitutional bartering:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such condition as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the sur-

> render of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost Trucking Co. v. *Railroad Comm'n*, 271 U.S. 583, 593-94, 46 S.Ct. 605, 607, 70 L.Ed. 1101 (1926).

I would also like to explain my position on the matter of the "mid-stream" recusal and its effect on the instant en banc proceedings.[1] In my view, the issue is not so much the enforcement of 28 U.S.C. § 455(a) (1982), but the proper interpretation and application of this court's en banc rule, 6th Cir.R. 14(a).[2] Today's culmination of these en banc proceedings, in light of recent events, amounts to a tacit refusal to acknowledge the practical effect of our local en banc rule and to apply that rule in a just and evenhanded manner.

Only a few uncontested facts are material to my concerns.

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[1] It is most regrettable that a fine judge of this court has become the unfortunate object of this dispute. Nonetheless, he has forthrightly admitted that his impartiality in this case might reasonably be questioned.

The discussion in the majority opinion at footnote 1 and accompanying text essentially misses the point. It is historically interesting, but irrelevant to my concern nonetheless, that years ago under different statutory standards Supreme Court Justices did not consider recusal mandatory in similar situations. In the instant case, a judge of our court *has* recused himself after casting an outcome-determinative vote. We as a court are left to deal with — not duck — that fact.

[2] I am unable to agree with the Chief Judge's analysis of the interplay of the court's en banc procedure and the recusal statute, set forth at Part I of his separate opinion. We cannot absolve ourselves of our responsibility to deal with the effect of a recusal by suggesting that this circuit's en banc procedure is "controlled" by 28 U.S.C. § 46(c) and Fed.R.App.P. 35, in addition to our local rule. The unique history of this case separates it from the material provisions of the codified standards and leaves a procedural question of first impression at our doorstep.

I am, however, in full accord with the Chief Judge's partial dissent, set forth at Part II of his separate opinion, discussing the unconstitutionality of the waiver provision of the Ohio Court of Claims Act.

The first is that a panel decision of this court reversed a judgment of the district court in this case. The losing party then petitioned for en banc reconsideration under local rule 14. After a polling of active judges, a bare majority (8 of 15) voted in favor of en banc review. Pursuant to our rule, that vote had the immediate effect of vacating the panel's decision. After reargument of the case, a member of our court who cast the deciding vote to rehear in polling recused himself from a vote on the merits, due to an appearance of partiality. To my knowledge, that judge's self-recusal was not motivated by any circumstances different from those existing at the time of the en banc polling.

It is absolutely crucial, as an initial matter, to understand the effect of that vote in favor of en banc reconsideration, and to distinguish it, for instance, from a vote of the United States Supreme Court on a petition for writ of certiorari to review a panel decision. The grant of a writ of certiorari is a completely neutral consent to review the most recent lower court decision. A vote to review en banc, by contrast, operates to stay the issuance of this court's mandate, vacates the panel decision, and schedules a full reconsideration of the district court judgment. In situations where the panel had voted to reverse the district court, a vote to rehear en banc effectively changes the posture of the parties to reflect the status quo ante.

But for the vote of the fifteenth judge, the panel decision would not have been vacated and today's opinions would never have been issued. Undeniably, that vote was outcome-determinative. Equally undeniable is the fact that it was cast by one who later admitted that his impartiality was subject to question. By allowing that vote to stand, we wink at the reality of the conflict. There is no basis in common sense for not giving the instant recusal retroactive effect under our en banc rule. To the extent that we as a court find ourselves in an unprecedented and embarrassing position, the only just way to extricate ourselves is to rescind the order vacating the panel decision and issue the mandate on that decision.

MILBURN, Circuit Judge, dissenting.

The primary issue confronting the court involves the interpretation of Ohio Rev. Code § 2743.02(A) with regard to whether the plaintiff-appellant under the circumstances here involved waived her federal claims against the defendant employees of the State of Ohio. In my opinion, we need not reach under the present circumstances the issue of whether the statute constitutes an impermissible limitation on federal jurisdiction. Since the majority opinion does not set out the statute in full, it is set out here:

> (A)(1) The State hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.
>
> Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

In my view, resolution of the present dispute turns on whether the court of claims made a finding as to whether the individual defendants acted "manifestly outside the scope of . . . employment" or "with malicous purpose, in bad faith, or in a wanton or reckless manner." It is true, as the majority points out, that the court of claims determined that the termination of Ms. Leaman's employment "was in accordance

with the law." However, it is clear that the court of claims focused upon the fact that Ms. Leaman was a probationary employee, and thus had no property interest in her continued employment.

The court of claims went on to note that Ms. Leaman had filed a section 1983 action in federal court. It made no finding on the issue of whether the individual employees acted outside the scope of employment. The language used by the court of claims judge in dismissing Ms. Leaman's action was: "The issues of the rights of a '1983' action apparently are being determined in federal court. This court has difficulty understanding why the case is pending in the Court of Claims involving the same issues and the same party, namely the State of Ohio."

In an analogous context, Ohio courts considering the proper course of action when simultaneous suits are filed in the court of claims and the state court of general jurisdiction, have concluded that the action against the individual employees cannot be dismissed until the court of claims makes a finding regarding the scope of employment. *See, e.g., McIntosh* v. *University of Cincinnati*, 24 Ohio App3d 116, 493 N.E.2d 321 (1985); *Von Hoene* v. *Department of Rehabilitation and Correction*, 20 Ohio App.3d 363, 486 N.E.2d 868, 872 (1985); *Smith* v. *Stempel*, 65 Ohio App.2d 36, 414 N.E.2d 445, 449 (1979). Given the absence of such a finding in the present case, the action against the individual employees should be allowed to proceed.

The majority opinion effectively denies Ms. Leaman the opportunity to have her claims against the individual defendants considered in any forum. In my view, such a result is not contemplated by the statute as it has been construed by the Ohio courts and is manifestly unfair. Accordingly, I respectfully dissent.

APPENDIX B

No. 85-3471
UNITED STATES COURT OF APPEALS
For The Sixth Circuit

MARY KATE LEAMAN,
Plaintiff-Appellant,
v.
MINNIE FELLS JOHNSON, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed July 10, 1986

Before: LIVELY, Chief Judge; MERRITT and NELSON, Circuit Judges.

MERRITT, Circuit Judge, delivered the opinion of the court, in which LIVELY, Chief Judge, joined. NELSON, Circuit Judge, (pp. 4-8) delivered a separate dissenting opinion.

MERRITT, Circuit Judge. In a suit for injunctive relief and damages under 42 U.S.C. § 1983, plaintiff, a former probationary employee of the Ohio Department of Mental Retardation, claims that her superiors discharged her because of her vocal concern and disagreement expressed to court personnel and others about the treatment of a particular mentally retarded client. She sued supervisory employees of the Department. She alleges that her discharge over such matters of policy and expression of opinion constitutes a first amendment free speech violation and a violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (prohibiting "discrimination" against the handicapped in any program receiving federal assistance). We have no occasion to discuss the merits of her claim or any immunity defense because the

District Court dismissed her claim on a jurisdictional ground arising from a state created waiver or election of remedies rule.

The waiver issue arises because the plaintiff also sued the state in the Ohio Court of Claims for compensation. After the Court of Claims dismissed her action as a valid personnel decision without ruling on her constitutional claims (apparently reserving her federal claims for decision in federal court), the District Court below dismissed the action against the individuals on the ground that her state action constitutes "a knowing, intelligent and voluntary waiver" of her federal action. This waiver ruling is based on the Ohio Act creating Court of Claims actions which provides, in pertinent part, that "filing a civil action in the Court of Claims results in a complete waiver of any cause of action, based on the same act or omission . . . . against any state officer or employee . . . ." Ohio Revised Code § 2743.02(A).

There is no *res judicata* issue here. The reason for dismissal of plaintiff's action is based on a state waiver rule. The ruling undermines jurisdiction of a federal cause of action under § 1983 against state officials who allegedly injure a citizen in violation of a federal constitutional or statutory right. The state statute in question should be construed only to waive state created but not federally created claims against state officials. Neither the state courts nor the Court of Claims have construed the statute to limit federal actions. The Court of Claims acknowledged in its opinion that the plaintiff's first amendment issues would be "determined" in federal court. No suggestion is made that a waiver rule would apply there.

Acts of Congress enacted under Article III, such as 42 U.S.C. § 1983 and 28 U.S.C. § 1343, define the jurisdiction of the federal courts, and ordinarily the state may not withdraw or limit that jurisdiction by the adoption of waiver or election of remedies rule. A state cannot bar removal of cases to federal court as a condition of permitting a foreign corporation to do business in the state, *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874), or defeat federal jurisdiction by confining jurisdiction of an issue to a specialized state

court, *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425 (1869). It may be true in a diversity case after *Erie* that the doors of the federal courts are closed if the state would not entertain the claim, *see Angel* v. *Bullington*, 330 U.S. 183 (1947), but a federally created right should be heard in federal court even if the state has closed its doors to the parties, *id.* at 192. The reason for this rule is that otherwise a state would be able to obstruct and frustrate the obligation and the remedy created by federal law. *See also Rosa* v. *Cantrell*, 705 F.2d 1208 (10th Cir. 1982) (state statute conditioning workman's compensation on waiver of other claims does not affect § 1983 action). Therefore, we decline to interpret the state statute in question here to apply a waiver rule that would oust a federal court of federal question jurisdiction.

The judgment of the District Court is therefore reversed and the case remanded for further proceedings.

DAVID A. NELSON, Circuit Judge, dissenting. An act of the Ohio legislature says that the filing of a civil action against the State of Ohio in the Ohio Court of Claims results in a complete waiver of "any" cognate cause of action the plaintiff has against any individual state officer or employee. O.R.C. § 2743.02(A)(1). If this statute meant what it seems to say, the court suggests, it would be unconstitutional; therefore, the court concludes, that is not what it means. Beacuse I do not believe that statute would be unconstitutional if construed to mean what it says, I respectfully dissent.

But for the possible constitutional problem, the statutory language would not seem ambiguous. It provides for the "complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee." Judges of the United States District Courts for both the Northern and Southern Districts of Ohio have read these words as covering any cause of action created by federal law, as well as state law. (In addition to the trial court's order in the instant case, see *Ferrari* v. *Woodside Receiving Hospital*, 624 F.Supp. 899, 902 (N.D. Ohio 1985): "if the language in § 2743.02(A) of the Ohio Revised Code is

to be given effect, this court must find that the plaintiff voluntarily waived a *federal cause* of action in favor of an action against the State of Ohio." (Emphasis supplied.)) Absent any constitutional problem, I would find the district courts' reading of the statute unexceptionable: "any cause of action" does not, to me, mean "any cause of action arising under the law of any state or political subdivision thereof or any foreign country but not under the law of the United States."[1] And if the statute means what the district courts have said it means, the Ohio Court of Claims is bound by it, of course, just as the federal courts are, if the statute is constitutional.

I do not view the Ohio statute as withdrawing or limiting the jurisdiction of the federal courts to entertain actions under 42 U.S.C. § 1983, anymore than it withdraws or limits the jurisdiction of state courts to entertain such actions. The dismissal of plaintiff's federal lawsuit was not based on lack of jurisdiction; according to the District Court's order, it was based on plaintiff's failure to state a claim against the defendant officials.

If the defendant officials had pleaded and proved an accord and satisfaction—if they had shown that plaintiff had given them a written release of all claims in exchange for a monetary consideration—the defendants would surely have been entitled to a dismissal in any court, state or federal, in which plaintiff might have brought her action; but I would not have supposed that recognition of such a defense could be said to impinge improperly upon the court's jurisdiction. This is a situation not where the court has no jurisdiction, but where the plaintiff has no case.

In *Home Insurance Company of New York* v. *Morse*, 84 U.S. (21 Wall.) 445 (1874), the Supreme Court held that an insurance company could not be required, as a condition of

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[1] I am strengthened in my conclusion by this court's recent decision in *United States* v. *Winson*, ____ F.2d ____ (6th Cir. 1986), holding that even under the strict construction accorded criminal statutes, the words "any court," as used in 18 U.S.C. § 922(h)(1), are "patently unambiguous" and do not exclude foreign courts.

doing business in the state of Wisconsin, to agree in advance that actions brought against it in Wisconsin's courts would never be removed to the federal courts on diversity grounds. The reasoning of the Supreme Court shows, I think, why *Home Insurance* is not controlling here:

> "In a civil case [a person] may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge [without a jury.] So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. *In these aspects any citizen may no doubt waive the rights to which he may be entitled.* He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." 87 U.S. at 451. (Emphasis supplied.)

This does not suggest to me that if a cause of action had arisen in favor of Home Insurance Company against the State of Wisconsin and its Commissioner of Insurance, Home Insurance Company could not have chosen to waive its right to sue the Commissioner in exchange for the State's agreement to waive its immunity from suit. Yet that is just the kind of choice offered to the plaintiff in the case at bar and voluntarily accepted by her.

Ohio has made a standing offer for such a mutual waiver in O.R.C. § 2743.02. The statute in effect tells the citizen who has a grievance against the State of Ohio and one of its officials that he is perfectly free to sue either the State or the individual official, but if he wants the State to waive its sovereign immunity, he must waive his claim against the official. The plaintiff in the case at bar chose to do that, giving up her claim against the official in exchange for an opportunity to take her chances on an action against the State in the Ohio Court of Claims—an action the State was not required to let her bring, and in which the prospects for full recovery on any judgment would have been excellent had she prevailed. Not having fared as well as she had hoped to in the

Court of Claims, plaintiff now seeks to repudiate her bargain and return to square one. I agree with the district court that she has no constitutional right to do so.

As the district court said:

> "By filing in the Ohio Court of Claim [sic], Plaintiff has made a knowing, intelligent, and voluntary waiver of her right to bring claims against officers and employees of the state. In exchange for that waiver Plaintiff received a solvent Defendant. There being no statutory or constitutional impediment to such an arrangement, this Court will hold Plaintiff to her *quid pro quo* and dismiss the individual Defendants for failure to state a claim against them."

The *quid pro quo* to which the district court refers is by no means illusory, of course. The plaintiff could not have sued the State of Ohio in federal court because "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III," *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 98 (1984), and the Ohio Court of Claims Act does not constitute a waiver by the State of its immunity "with respect to actions pending in federal or other state courts." *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 681 (6th Cir. 1976). Ohio was under no constitutional duty to offer anyone the opportunity to take a shot at it in the Court of Claims, and it was not unfair for the State to tell plaintiff "we will agree to let you sue the master in the Claims Court if you will agree to surrender your claim against the servant." That is not an unconstitutional condition, in my judgment, where the master has a constitutional immunity from suit. And it does not seem a bad bargain, as the district court suggested, when one considers the depth of the master's pocket in comparison to the depth of the servant's.

Payne v. *Hook*, 74 U.S. (7 Wall.) 425 (1869), held only that the administrator of an estate was subject to suit in a federal court on diversity grounds notwithstanding that in the state court system exclusive jurisdiction over such disputes lay with a local probate court. I see no inconsistency between the

holding of the Supreme Court there and the holding of the district court here.

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946), an opinion by Mr. Justice Frankfurter, held that a suit in equity brought in federal court under the Federal Farm Loan Act was not controlled by a state statute of limitations that would have been a bar if the suit had been based on diversity of citizenship. Frankfurter distinguished *Holmberg* in his subsequent opinion in *Angel* v. *Bullington*, 330 U.S. 183, 192 (1947), a diversity action where the outcome was determined by a prior state court proceeding in which it had been held that a state statute deprived the state courts of jurisdiction. Neither case seems to me to suggest that the district court reached an erroneous result in the case at bar.

Rosa v. *Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983), which plaintiff's brief says is "most directly on point," did not involve a statute giving plaintiff the option of procuring a waiver of the state's sovereign immunity at the cost of waiving any right to recover from the state's employees. The public body involved in that case was a city that had no sovereign immunity. The city had paid workers' compensation benefits under a statute providing that the rights and remedies established by the act "are in lieu of all other rights and remedies . . . ." § 27-12-103(a), Wyoming Statutes. The exclusivity feature of the statute was held not to bar a § 1983 claim because such a bar would conflict with the remedy provided by Congress. The district court saw no such conflict here, nor do I.

APPENDIX C

In the United States District Court
For the Southern District of Ohio
Western Division

Case No. C-1-84-999

MARY KATE LEAMAN,

Plaintiff,

v.

OHIO DEPT. OF MENTAL RETARDATION & DEVELOPMENT, ET AL..

Defendants.

ORDER

(Filed June 13, 1985)

This matter is before the Court on plaintiff's Motion to Refile Complaint. (Doc. no. 17). The Court's previous Order permitting plaintiff to refile was conditioned on a Court of Claims finding that the individual defendants herein acted outside the scope of their employment, with maliciousness, bad faith, or wantoness or recklessness. (Doc. no. 16 at 6-7). That condition has not been met as the Court of Claims concluded that the state officials acted properly. (Doc. no. 17, exhibit A). The Motion is therefore DENIED.

Plaintiff also contests the portion of the prior Order that dismissed the defendant state for Eleventh Amendment reasons. Plaintiff reasons under *Ex parte Young*, 209 U.S. 123 (1908), that injunctive relief is still available. Such reasoning ignores the fact that *Ex parte Young* injunctions are not available against the state. They are available only against state officials. *Pennhurst State School & Hospital* v. *Halder-*

man, ___ U.S. ___, 104 S. Ct. 900, 909 (1984). Since this Court's prior Order held that plaintiff had waived all her claims against all state officials, *Ex parte Young* injunctive relief is not available.

IT IS SO ORDERED.

/s/ CARL B. RUBIN, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
District: Southern District of Ohio

Docket Number: C-1-84-0999

Name of Judge or Magistrate:
Chief Judge Carl B. Rubin

MARY KATE LEAMON

v.

OHIO DEPARTMENT OF MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES, ET AL.

JUDGMENT IN A CIVIL CASE
(Filed June 13, 1985)

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That by Order of Judge Rubin Doc. #5 Motion to Dismiss by deft. is GRANTED.

Nunc Pro Tunc May 14, 1985; Doc. #17 Motion to Re-File Complaint is DENIED.

Clerk: Kenneth J. Murphy
(By) Deputy Clerk: D. A. Myers

Civ. No. C-1-84-999
UNITED STATES DISTRICT COURT,
S.D. Ohio, W.D.

Mary Kate Leaman,

Plaintiff,

v.

Ohio Department of Mental Retardation and Developmental Disabilities, et al.,

Defendants.

May 14, 1985

Employee of Ohio Department of Mental Retardation and Developmental Disabilities brought suit challenging her termination. On defendants' motion to dismiss, the District Court, Carl B. Rubin, Chief Judge, held that: (1) Department was entitled to Eleventh Amendment protection, and (2) statute waiving Ohio's Eleventh Amendment protection from actions brought in specially created Court of Claims barred claims against state officers and employees.

Motion granted.

Marc D. Mezibov, Cincinnati, Ohio, for plaintiff.

Deborah A. Piperni, Columbus, Ohio, for defendants.

ORDER

CARL B. RUBIN, Chief Judge.

This matter is before the Court on Defendants' Fed.R.Civ.P. 12(b)(6) and (b)(1) Motions to Dismiss. (Doc. Nos. 5, 10) For the reasons that follow, the motions are GRANTED as outlined below.

A. FACTS

The following facts are taken from the complaint and ac-

cepted as true for the purpose of this motion. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

1. Plaintiff was employed by the Ohio Department of Mental Retardation and Developmental Disabilities (DMR) from December 12, 1983, until Aprl 7, 1984. During that time, Plaintiff was a case management specialist assigned to the Cincinnati office. On April 7, 1984, DMR dismissed Plaintiff stating that she failed to fulfill the requirements of her position. (Doc. No. 1, Exhibit B) Plaintiff appealed her dismissal to the Ohio Personnel Board of Review. The Board of Review found that DMR had complied with the applicable statute and dismissed the appeal for lack of jurisdiction pursuant to the Ohio Administrative Code § 124-1-06. (Doc. No. 1, Exhibit A)

2. Plaintiff's difficulties with DMR began when she was assigned to the case of a juvenile named D.M.[1] DMR had been directed by the Hamilton County Juvenile Court to provide for the care, custody, and well-being of D.M. consistent with the provisions of Ohio Revised Code § 5123.67. (Doc. No. 1 at 5) When Plaintiff took over D.M.'s Case, the juvenile resided in a facility for the profoundly retarded. After visiting D.M. and reviewing her records, Plaintiff formed the opinion that D.M. was only mildly retarded and that placement was inappropriate. A running battle ensued among Plaintiff, her supervisors, and the Juvenile Court over the proper placement of D.M.

3. As a result of her advocacy of D.M.'s interests in this battle, Plaintiff was fired. She now seeks injunctive relief and damages under 42 U.S.C. § 1983; § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982); and the due process clause of the Fourteenth Amendment. Named as Defendants in the action are DMR; Minnie Fells Johnson, Director of DMR; Sandra A. Crockett, Commissioner of Residential Services at DMR;

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[1] To provide for the anonymity of this particular juvenile, Plaintiff has used the juvenile's initials for purposes of its pleadings.

Joyce Scott, Chief of Client Services at DMR; and Shirley Wilson-Young, Assistant Chief of Client Services at DMR.

4. Five months after commencing this action, Plaintiff filed a complaint against the State of Ohio in the Ohio Court of Claims based on the same set of facts above. (Doc. 10, Exhibit B) This complaint is virtually identical to the original complaint filed in this Court.

Defendants have filed motions to dismiss both the complaint and an amended complaint. These motions raise numerous issues, only two of which need be addressed for disposition of the case. The first issue is whether the doctrine of sovereign immunity bars suit against DMR. The second issue is whether Plaintiff's suit in the Court of Claims suit bars this action against individual Defendants.

B. SOVEREIGN IMMUNITY

[1, 2] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The amendment bars suits brought in federal court by private parties seeking to impose a liability that must be paid from public funds in the state treasury. *Quern* v. *Jordan*, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979). Its prohibition includes suits by citizens against their own state or state agencies. *Edelman* v. *Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974); *See, e.g., Alabama* v. *Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Hans* v. *Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). The amendment applies to actions brought under 42 U.S.C. § 1983. *Edelman*, 451 U.S. at 675-77, 94 S.Ct. at 1361-62.

[3] Plaintiff does not dispute DMR's claim to sovereign immunity nor can she. As a state created, operated, and financed institution, DMR is clearly an arm of the state entitled to Eleventh Amendment protection. *See Ohio Rev.*

Code Ann. ch., 5123 (Page 1981). *See, e.g., Lee* v. *Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062 (6th Cir. 1984); *Hall* v. *Medical College*, 742 F.2d 299 (6th Cir. 1984). DMR must, therefore, be dismissed from the suit for Plaintiff's failure to state a claim against it upon which relief can be granted.

C. OHIO REVISED CODE § 2743.02(A)(1)

The second issue in this case involves an application of § 2743.02(A)(1) of the Ohio Revised Code (O.R.C.). That section waives Ohio's Eleventh Amendment protection from actions brought in a specially created Court of Claims. To obtain such waiver, the Plaintiff must waive her right to bring claims against state officers or employees that arise from the same act or omission that formed the basis of the suit against the state. Ohio Rev.Code Ann. § 2743.02(A)(1) (Page 1981). Plaintiff's waiver is void if the Court of Claims determines that the state officer or employee was acting outside the scope of his employment or acted with malicious purpose, bad faith, or in a wanton or reckless manner. *Id.*

[4] On December 14, 1984, Plaintiff filed a complaint against the state in the Ohio Court of Claims. Application of § 2743.02(A)(1) requires dismissal of Plaintiff's claims against the individual Defendants in this case. Plaintiff argues against such a result claiming that the Ohio law is inconsistent with the laws of the United States. She cites in support of her contention *Rosa* v. *Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983).

Rosa involved a § 1983 suit for the wrongful death of Plaintiff's husband at the hands of a city public safety director. The Defendant city interposed the defense that Plaintiff, by accepting state workers' compensation benefits was barred under Wyoming law from bringing any claims against the employer city. The court analyzed this defense under 42 U.S.C. § 1988, which allows state law to govern civil rights

suits where no federal law applies.[2] State law may only apply, however, when "not inconsistent with the Constitution and the laws of the United States. . . ." *Id.* The Court found the exclusive remedial provision of the state workers' compensation statute to be inconsistent with the available federal remedy. 705 F.2d at 1221. In arriving at its conclusion, the court noted that by limiting Plaintiff's remedy, the Wyoming statute thwarted § 1983's policy of preventing abuses of power by those acting under color of state law. *Id. See also Robertson* v. *Wegmann*, 436 U.S. 584, 591, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

[5] Such is not the case here. Rather than cut off Plaintiff's § 1983 cause of action and remedy as did the Wyoming statute, application of the Ohio statute would leave Plaintiff's claim intact. Ohio merely requires adjudication of the claim in a special state court. Plaintiff's action and the policies behind § 1983 are preserved as state courts have jurisdiction to hear § 1983 cases. *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). Further, the Ohio statute is in line with United States Supreme Court holdings permitting states to limit waiver of their immunity to suits brought against them in their own courts. *See Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944); *Smith* v. *Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900).

By filing in the Ohio Court of Claims, Plaintiff has made a

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[2] The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry out the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statuutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .
42 U.S.C. § 1988 (1982)

knowing, intelligent, and voluntary waiver of her right to bring claims against officers and employees of the state. In exchange for that waiver, Plaintiff received a solvent Defendant. There being no statutory or constitutional impediment to such an arrangement, this Court will hold Plaintiff to her *quid pro quo* and dismiss the individual Defendants for failure to state a claim against them.

D. CONCLUSION

Defendants' Motions to Dismiss are GRANTED as to Defendant DMR. Defendants' Motions to Dismiss are GRANTED as to the remaining Defendants with the condition that Plaintiff may refile in this Court against the individual Defendants should the Court of Claims find that they acted outside the scope of employment, with maliciousness, bad faith, or wantoness or recklessness.

IT IS SO ORDERED.

APPENDIX D

No. 84-09161
IN THE COURT OF CLAIMS OF OHIO

MARY KATE LEAMAN,
Plaintiff,

v.

OHIO DEPARTMENT OF MENTAL RETARDATION & DEVELOPMENT DISABILITIES,
Defendant.

DECISION
JUDGMENT ENTRY

Decided May 8, 1985

This cause came on to be heard upon the motion of the defendant to dismiss the complaint herein on the grounds that it did not state a cause of action. The facts in this case are relatively simple, namely that the plaintiff was employed in the case management position with the defendant O.D.M.R. Within the probationary period of 120 days plaintiff was discharged. Plaintiff attempted to appeal her case to the Ohio State Personnel Board of Review, which appeal was dismissed for lack of jurisdiction. The recommendation of the department head for O.D.M.R. became a final order.

The defendant complied with the statutory requirements that upon terminating a person on a probationary period, who has served more than half of the probationary period, shall be notified in writing of the basis of the termination.

The reasons for the termination were clearly spelled out in a letter from the defendant to the plaintiff said letter being dated April 4, 1984, which letter is entered as an exhibit at-

tached to plaintiff's complaint as incorporated herein by reference. The issue to be resolved by this court, while confused by other claims made by the plaintiff, is whether her termination was in accordance with the law. The court will comment that the plaintiff is claiming that her First and Fourteenth Amendment Rights were violated. As to the validity of the termination, the court finds that the plaintiff was validly terminated from her position with the defendant agency. The law as it relates to the termination of probationary employees is well spelled out in the case of *Hill, appellant* v. *Gatz et al., appellees*, 63 Ohio App. 2d 170.

> 1) The continued employment of a probationary civil servant is at the discretion of the appointing authority after completion of sixty days or after the first half of the probationary period, whichever is greater. The decision of the appointing authority made during such period to terminate a probationary civil servant's employment is final and not subject to administrative or judicial review.
>
> 2) A probationary civil servant, after completion of sixty days or after the first half of the probationary period, whichever is greater, cannot claim a property interest in his continued government employment sufficient to be protected by the Fourteenth Amendment to the United States Constitution. A civil servant obtains a legitimate claim of entitlement to continued employment only after attaining a permanent tenured status.

Plaintiff's Fourteenth Amendment claim or due process claim is well answered in the above decision at page 176.

> Appellant's first contention under his second assignment of error is that his probationary employment is a property interest protected by his rights under the Fourteenth Amendment. We do not agree.
>
> It has been repeatedly held that probationary and nontenured employees do not have a property interest in their continued employment. (citations omitted)

In State, ex rel. Trimble, v. State Board of Cosmetology (1977), 50 Ohio St. 2d 283, 285, the Ohio Supreme Court stated the principles of determining whether an employee has a property interest in continued employment, as follows:

"Appellant's due process claim is without merit. The requirements of procedural due process—including the right to a hearing claimed by appellant—'apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.' Board of Regents v. Roth (1972), 408 U.S. 564, 569. To have a protected property interest in a benefit such as continued employment by a state agency, an individual must have more than 'an abstract need or desire for it' or a 'unilateral expectation of it.' He must, instead, 'have a legitimate claim of entitlement to it.' Roth, supra, at page 577."

In Bishop v. Wood (1976), 426 U.S. 341, the United States Supreme Court held that a police officer had no property interest in his continued employment by a city despite the fact he was a permanent employee and had been employed for almost three years.

The court enunciated the following principles:

"A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." Bishop v. Wood, supra, at 344.

In footnote seven, this principle was explained in further detail by citation to Board of Regents v. Roth, supra, as follows:

" 'Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' Board of Regents v. Roth, 408 U.S. 564, 577." See Board of

> Curators of the University of Missouri v. Horowitz (1978), 435 U.S. 78, 82; Perry v. Sindermann (1972), 408 U.S. 593, 599-603.
>
> Clearly, any reference to R.C. 124.27 and 124.34 establishes that a civil service employee obtains a legitimate claim of entitlement to continued employment only after attaining a permanent tenured status. R.C. 124.27 specifically provides that "* * * no appointment or promotion is final until the appointee has satisfactorily served his probationary period." Once an employee has attained permanent employment status, certain rights enumerated in R.C. 124.34 attach and together with these rights, the expectation of continued employment also attaches.
>
> Appellant during his probationary period cannot claim a property interest in his continued government employment sufficient to be protected by the Fourteenth Amendment to the United States Constitution.

See also Walton v. Welfare Department (1982), 69 Ohio St. 2d 58.

The Walton case stated that:

> "the removal of a probationary employee who has completed 60 days or one-half of her probationary period, which ever is greater, may not be appealed to the State Personnel Board of Review (R.C. 124.27 construed).

The above cited case discusses rather completely the principle back of the right to terminate a probationary employee. The following are quotes from that decision.

> The first question presented is whether a probationary employee who has completed 60 days or one-half of her probationary period, whichever is greater, may be removed for unsatisfactory service without right of appeal to the State Personnel Board of Review. For the following reasons, we hold that no right of appeal is provided to such employee by statute or by Section 10, Article XV of the Ohio Constitution.

Since 1913, Ohio has provided a probationary period for civil service employees. The requirement of a period of probationary service has been held to be part of a valid statutory scheme implementing Section 10, Article XV of the Ohio Constitution. State, ex rel. Clements, v. Babb (1948), 150 Ohio St. 359, 368-369. Specifically, in Babb, this court held that the requirement of the Ohio Constitution that appointments and promotions be ascertained by competitive examination "as far as practicable" leaves room for the possibility that examination might not be the sole test of merit and fitness. For that reason a probationary period might be imposed to aid in determining fitness. Id. Successful completion of the prescribed probationary period is required before appointment to a civil service position is made final. State, ex rel. Artman, v. McDonough (1936), 132 Ohio St. 47, 49.

Since the probationary period is for the benefit of the appointing authority to aid in the determination of merit and fitness for civil service employment, State, ex rel. Kelly, v. Hill (1950), 88 Ohio App. 219, 221, the General Assembly historically has provided for a degree of leeway in the dismissal of probationary employees. State, ex rel. Stine, v. Atkinson (1941), 138 Ohio St. 217, 219. As originally enacted, G.C. 486-13 (predecessor to R.C. 124.27)[1] provided that leeway at the end of the probationary period:

"* * * At the end of the probationary period the appointing officer shall transmit to the civil service commission a record of the employee's service, and if such service is unsatisfactory, the employee may with the approval of the commission, be removed or reduced without restriction; but dismissal or reduction may be made during such period as provided in section 17 hereof." (103 Ohio Laws 698.)

Although this statute appeared to provide appeal rights for employees dismissed during the probationary period, the reported cases uniformly addressed the issue

of appeal from removal at the end of the probationary period. The distinction serves to point out a historical dichotomy in legislative policy regarding probationary employees. This policy affords a probationary employee the criteria for his removal and the full appeal rights of a tenured employee at the earlier stages of public employment. Thus, probationary employees may receive a fair trial on the job and have "an opportunity to demonstrate their ability and competence in their job positions." Hill v. Gatz (1979), 63 Ohio App. 2d 170, 173-174.[2] On the other hand, at the later stages of probationary employment, the interest of the appointing authority in maintaining a satisfactory and competent work force comes into play, and discretionary removal is allowed.

This historical legislative balancing of interests through a two-stage probationary process has been carried over into the present R.C. 124.27, which provides: "* * * If the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period after completion of sixty days or one-half of his probationary, whichever is greater. If the appointing authority's decision is to remove the appointee, his communication to the director shall indicate the reason for such decision. Dismissal or reduction may be made under provisions of section 124.34 of the Revised Code during the first sixty days or first half of the probationary period, whichever is greater." This section continues an unbroken legislative policy of nearly 70 years that no appeal shall be provided from a removal other than at a specified stage in the probationary period.

Appellee contends that affirmance is compelled by State, ex rel. Kendrick, v. Masheter (1964), 176 Ohio St. 232. In Masheter this court held that R.C. 143.012[3] (predecessor to R.C. 124.03[B]) provided jurisdiction to the State Personnel Board of Review to hear appeals by classified civil service employees from layoff decisions of

appointing authorities. This argument fails on two grounds.

First, the statutory scheme in effect when Masheter, supra, was decided did not include any specific language concerning appeal from layoffs. Thus, we turned to the general provisions of R.C. 143.012 to determine whether such an appeal was intended by the General Assembly. Given the general requirement that an appeal be provided, and noting the absence of any specific provision denying an appeal, we concluded that such an appeal was contemplated. That conclusion was necessary in order to accomplish the legislative plan of R.C. Chapter 143 and to avoid an absurd result. Id., at page 234.

No such difficulty arises here. The General Assembly specifically provided in R.C. 124.27 a two-tiered scheme for probationary removal and appeal. These specific provisions control over the more general language of R.C. 124.03(B). R.C. 1.51. This case is distinguishable, then, from Masheter in that R.C. Chapter 143 provided no specific provision concerning appeal from layoff, whereas R.C. Chapter 124 does specifically address appeal from probationary removal. There is no necessity in the case sub judice to rever to the general statute to effectuate the legislative scheme.

The Walton decision further discusses at length the Fourteenth Amendments rights.

Secondly, construction of R.C. 124.27 so as to provide an appeal from second-half probationary removals would result in absurd consequences clearly sought to be avoided by the General Assembly. The granting of such an appeal, without tying it into the procedural steps required by R.C. 124.34, would create different statutes of limitation for appeal, different records for review, and varying appeal rights from decisions of the State Personnel Board of Review for the two categories of probationary removal. There is no support in R.C. Chapter

124 for this anomalous situation and we decline to impose it through an act of judicial legislation.[4]

Furthermore, the Masheter decision placed reliance on the administrative interpretation of the statute in question. Id., at page 235. Accordingly, we note that Ohio Adm. Code 124-1-06 is in accord with our view of R.C. 124.27.[5]

Our decision here does not leave second-half probationary employees subject to the unfettered whim and caprice of appointing authorities. Abuse of the discretion granted to those having the power of removal may be redressed pursuant to R.C. 124.56. However, any further right of appeal by second-half probationary employees must await legislative action.

The second question presented is whether the due process clause of the Fourteenth Amendment to the United States Constitution compels Ohio to accord a hearing to a civil service employee removed during the second half of her probationary period. We conclude that the Constitution does not so require.

"The requirements of procedural due process apply only to the deprivations of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth (1972), 408 U.S. 564, 569. Whether an interest subject to procedural due process exists is determined by an examination of the nature of the interest at stake. Id., at page 571. More specifically, Fourteenth Amendment procedural protection is extended to those "interests that a person has already acquired in specific benefits." Id., at page 576.

The United States Supreme Court has further elucidated those attributes of the property interests[6] protected by procedural due process:

"* * * To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. * * *

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement of those benefits." (Footnotes omitted)

This court fully realizes that the plaintiff in a rather lengthy and detailed complaint and equally lengthy and detailed memorandum contra plaintiff's motion to dismiss has set up claim violations of plaintiff's First Amendment Right of "free speech." The court is also fully aware that the plaintiff has alleged violations of 29 U.S.C. 794 and 794(A). By whatever name the claims are made, this court construes it as an appeal challenging the judgment and decision of the state agency. The court could visualize situations where every person terminated during a probationary period could claim that his First Amendment Right of "free speech" has been violated. This court highly questions whether that is the intent of the First Amendment. As to the 29 U.S.C. 794 and 794(A), these deal with the rights of handicapped persons. To permit a probationary worker who has worked in her probationary position for less than 120 days, and who obviously disagreed with her superiors to state a cause of action even with the broad rights under the O'Brian case would, this court's opinion, represent an entirely untenable position.

By way of comment, the court would note that in the form for "connected actions" plaintiff indicates a case was filed in United States District Court, Southern District of Ohio, Western Division, on July 11, 1984, and has been assigned to Judge Rubin, the district Judge. While the court has not seen the complaint filed in the federal court, the style would indicate that the action has been brought virtually contemporaneously in both courts. The issues of the rights of a "1983" action apparently are being determined in federal court. This court has difficulty understanding why the case is

pending in the Court of Claims involving the same issues and the same party, namely the State of Ohio.

Defendant's January 23, 1985, motion to dismiss is granted. Cost's charged to the plaintiff.

/s/ GEORGE E. TYACK, JUDGE

Entry cc:

Marc D. Mezibov
36 East Fourth Street
Suite 714
Cincinnati, Ohio 45202
Plaintiff's Attorney

William J. McDonald
State Office Tower-17th Floor
30 East Broad Street
Columbus, Ohio 43215
Defendant's Attorney
Assistant Attorney General

C.C. Form 22

NOTICE TO PARTIES OF THE APPELLATE PROCESS IN CIVIL ACTIONS IN THE COURT OF CLAIMS

1) Final judgments in civil actions, other than administrative determination claims under R.C. 2743.10, may be appealed to the:

Tenth District Court of Appeals
369 South High Street
Columbus, Ohio 43215.

2) The Rules of Appellate Procedure apply to the appeals of final judgments in civil actions in the Court of Appeals.

3) At the time a notice of appeal (see Form 1 of the Appellate Rules) is filed, the person filing the notice of appeal must — if there was a trial or hearing — order the transcript and file a docketing statement. See App. R. 3(D) and (F), App. R. 9(B), App. R. 11.1 and Tenth District Court of Appeals Local Rule 4. A copy of a docketing statement is enclosed. Sufficient copies of the notice of appeal must be filed to allow the Court of Claims to retain one copy of each of such documents and to serve one copy of such documents upon the Court of Appeals and all parties to the case being appealed. In addition, the person filing the notice of appeal must pay a $15.00 filing fee with the Court of Claims.

4) In the Court of Claims a transcript is ordered by filing a motion to reduce the audio tape of the trial or hearing to typewritten form. Such motion must state the complete name and address of the person or entity who will pay for the transcript. Upon receipt of the motion, the Court of Claims will issue an order directing the Clerk to transmit the appropriate audio tapes to a court reporter-transcriber and directing the court reporter-transcriber to transcribe the audio tapes, certify the transcription and develop the index required by the Tenth District Court of Appeals. The party ordering the transcript must make arrangements for the payment of the court reporter-transcriber which satisfy the court reporter-transcriber. See the second paragraph of App. R. 9(B).

5) In summary, in order to appeal a civil action in the Court of Claims a person must timely file: (A) a notice of appeal; (B) where a transcript is required, a motion for the reduction of the audio¬tape transcription of the hearing or trial to typewritten form; (C) a docketing statement, and, (D) a $15.00 filing fee (check or money order).

C.C. Form 23

IN THE COURT OF CLAIMS OF OHIO

DOCKETING STATEMENT

_____

Plaintiff

vs. CASE NO:

_____

Defendant

THIS APPEAL SHOULD BE ASSIGNED TO:

[ ] The regular calendar

[ ] The accelerated calendar for the reason checked:

[ ] 1. No transcript required.

[ ] 2. Transcript consists of 50 or fewer pages, or is of such length that its preparation time will not be a source of delay.

[ ] 3. Agreed statement submitted in lieu of record.

[ ] 4. Record was made in an administrative hearing and was filed with trial court.

[ ] 5. All parties to appeal agree to an assignment to the accelerated calendar.

[ ] Although the appeal meets one or more of the reasons for being assigned to the accelerated calendar, it should not be assigned to the accelerated calendar because:

[ ] 1. Brief in excess of 15 pages (see Tenth District Court of Appeals Local Rule 6) is necessary to set forth adequately the facts and argue the issues in the case.

[ ] 2. Appeal concerns unique issue of law which will be of substantial precedential value in the determination of similar cases.

[ ] 3. Other: _____

_____

_____

_____

Appellant or Attorney For Appellant

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-84-0999

MARY KATE LEAMAN
c/o Furer, Moskowitz & Mezibov
36 E. Fourth St., Suite 714
Cincinnati, Ohio 45202

Plaintiff,

vs.

OHIO DEPARTMENT OF MENTAL RETARDATION &
DEVELOPMENTAL DISABILITIES
30 E. Broad Street
Columbus, Ohio 43215

and

MINNIE FELLS JOHNSON
c/o Ohio Department of Mental Retardation &
Developmental Disabilities
30 E. Broad Street
Columbus, Ohio 43215

and

SANDRA A. CROCKETT
c/o Ohio Department of Mental Retardation &
Developmental Disabilities
30 E. Broad Street
Columbus, Ohio 43215

and

LOYCE SCOTT
c/o Ohio Department of Mental Retardation &
Developmental Disabilities
30 E. Broad Street
Columbus, Ohio 43215

and
SHIRLEY WILSON-YOUNG
c/o Ohio Department of Mental Retardation &
Developmental Disabilities
30 E. Broad Street
Columbus, Ohio 43215

Defendants.

COMPLAINT & JURY DEMAND
(Filed July 11, 1984)

Plaintiff, Mary Kate Leaman, for her cause of action against the various Defendants alleges:

NATURE OF THE CLAIM

1. Plaintiff brings this action pursuant to 29 U.S.C. 794 and 794(a) (Section 504 of the Rehabilitation Act of 1973) and 42 U.S.C. 1983 and 1988. Plaintiff complains of her termination on April 7, 1984 from employment with the Ohio Department of Mental Retardation & Developmental Disabilities (hereinafter called "DMR") as a case management specialist. Accordingly, Plaintiff seeks herein reinstatement to her former position, restoration of all attendant benefits, backpay, punitive damages and an award of her costs and attorney fees.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1343(3); 42 U.S.C. 1983; and 29 U.S.C. 794 and 794(a). The rights, privileges and immunities sought to be addressed herein are those secured by the First and Fourteenth Amendments to the United States Constitution; 42 U.S.C. 1983 and 29 U.S.C. 794.

3. Venue in the Southern District of Ohio is proper as each of the claims for relief arose in said district.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

4. On or about April 18, 1984, Plaintiff timely filed an appeal of her discharge with the Ohio State Personnel Board of Review; on or about June 25, 1984 it was recommended that the appeal be dismissed for lack of jurisdiction, a copy of said Recommendation is marked Exhibit 'A' and attached hereto; that the aforementioned Recommendation became a final order on or about July 6, 1984. There is no other remedy available to Plaintiff before such agency.

PARTIES

5. Plaintiff now and at all times pertinent hereto resided within the Southern District of Ohio. From December 12, 1983 until her discharge on April 7, 1984, Plaintiff was employed by DMR in the capacity of case management specialist assigned to the Cincinnati office.

6. Defendant DMR is a government body created and authorized by Ohio statute, to wit; O.R.C. 5123.02, et seq., to, *inter alia*, promote comprehensive state-wide programs and services for the mentally retarded and their families wherever they reside in the State of Ohio. As such, DMR administers a program for the assistance of handicapped persons which receives federal financial assistance. One of the primary purposes of federal funding is to provide for the training and employment of persons who provide services for the handicapped. During the period encompassed by this Complaint, Plaintiff was an employee of and a participant in that program.

7. Defendant, Minnie Fells Johnson, at all times pertinent hereto was the Director of DMR who was charged by law, to wit; 5123.04 O.R.C., with responsibility to appoint personnel within the department and to adopt and effectuate said rules, by-laws and policies by which the department operates. Defendants, Sandra Crockett, Loyce Scott and Shirley Wilson-Young, were at all times pertinent hereto, respectively, the Commissioner of Residential Services, Chief of Client Services, and Assistant Chief of Client Services. As such, each

of these Defendants was responsible for the effectuation of the rules, by-laws and policies promulgated, adopted or advanced by DMR. Each of the aforementioned Defendants is sued in her individual capacity.

8. At all relevant times each Defendant acted separately or jointly with other Defendants who acted under color of state law, custom, practice or usage.

STATEMENT OF THE CLAIM

COUNT I

9. Shortly after commencement of her duties with DMR, Plaintiff was assigned the case of a juvenile named DM.[1] Pursuant to an order of the Hamilton County Juvenile Court, DMR had been directed to provide for the care, custody and well-being of DM consistent with the provision of O.R.C. 5123.67. This case, which had previously been assigned to another case manager, had involved a great deal of Court contact and had evoked considerable controversy between and among the Hamilton County Juvenile Court, DMR and other county and state social agencies. The controversy concerned the nature and extent of DMR's responsibilities toward minors such as DM who have been determined to be mildly to marginally retarded and who exhibit behavioral problems of varying degrees.

In the case of DM, DMR took and advanced the position that DM was not subject to court ordered institutionalization by DMR and that DMR did not have licensed residential facilities for children diagnosed as mildly retarded.

10. When Plaintiff took over the case of DM, the juvenile was residing in the facility for the profoundly retarded. After visiting DM in the facility and reviewing the juveniles mental and physical health records, Plaintiff formed the opinion that the placement of DM was inappropriate, a view in which the facility itself concurred. Consequently, Plaintiff contacted

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[1] To provide for the anonymity of this particular juvenile Plaintiff has used the juvenile's initials for purposes of this pleading. Plaintiff will, if requested, provide such individual's full name under seal with the Court.

Defendant Scott who had assigned the case of DM to her and informed her of Plaintiff's opinion and of the fact that Plaintiff had contacted several residential facilities regarding DM who had expressed an interest in having the juvenile placed in one of their facilities. Scott advised Plaintiff not to pursue a change in DM's placement but to "just leave him there".

As she was directed, Plaintiff did not pursue appropriate 24-hour residential placement, but rather attempted with success to effect an interim placement at a facility not funded by DMR for the limited purpose of obtaining an objective assessment of DM's present and future needs. Defendants Young and Scott both expressed satisfaction with this arrangement, however, they further directed Plaintiff to neither seek full-time residential placement for DM in a DMR facility nor contact an outside facility notwithstanding the fact that the Hamilton County Juvenile Court had committed the juvenile to the custody of DMR and in so doing had directed DMR to provide an appropriate full-time residential facility for DM. While at all times in her professional capacity Plaintiff represented DMR's position to the Court and involved agencies, Plaintiff attempted to convince DMR through her superiors, Defendants Scott and Wilson, that DM's present and future well-being was not being served by the Department's official stance and that DMR was at risk of violating a court order by its failure to assume responsibility for the appropriate placement of DM.

11. When the attorney for DM filed a motion to show cause why DMR should not be held in contempt of the previous court order, Plaintiff was directed by Defendant Young not to involve DMR in the juvenile's placement and to advise the Court that DM was a "dependant child" not within the purview of the Department's responsibilities. Plaintiff so advised the Court. Nevertheless, the Court on or about February 13, 1984 ordered DMR to transfer DM to an Ohio Youth Advocate Network foster home and to provide all necessary services attendant to such placement and to incur all necessary costs for same.

12. When the foster parent with whom DM had been

placed requested that the juvenile be removed from the home, DM was placed in a juvenile detention facility in Hamilton County awaiting alternative placement. With the knowledge of Defendants Young and Scott, Plaintiff proceeded to explore possible residential possibilities for the minor. Having found such placement, Plaintiff advised Defendant Young of this fact who later informed Plaintiff that pursuant to instructions from Defendant Scott, DMR could not and would not assume the per diem cost for the placement of DM. She then directed Plaintiff to advise another social agency of DMR's position on this matter and to turn the case of DM over to that agency. In the meanwhile, Plaintiff was told not to seek placement but to leave the juvenile in the detention facility. Plaintiff advised Defendant Young that DMR's stance was harmful to her client and might again place DMR in contempt of court. Young thereupon advised Plaintiff to follow instructions regardless of what happened to DM.

13. Subsequently, on or about March 29, 1984, Plaintiff was advised by Defendant Young that Defendant Johnson had determined that DMR would not contest the court order and that Plaintiff should pursue a permanent placement for DM. Plaintiff proceeded with such arrangements but was later told by Defendant Young that the transfer of DM was on hold. In a later conversation with Defendant Young Plaintiff was told that she should again make arrangements for the transfer and that DMR was permitting her to do so only with grave reservations. Plaintiff was also advised that Defendant Young wanted to meet with Plaintiff concerning her employee evaluation. However, because Plaintiff was involved with details relating to the permanent placement of DM, she was unable to meet with Young and so advised her. On or about March 28, 1984, Plaintiff received a telephone call from Young informing her that Plaintiff was relieved of all case management responsibilities regarding DM and on April 2, 1984 she was advised that she should not report to work the following day.

14. On or about April 4, 1984, Plaintiff was notified in a letter from Defendants Crockett and Johnson that pursuant to

Ohio law she was probationally removed from her position with DMR for the reasons set forth therein. A copy of said letter is marked Exhibit 'B' and attached hereto.

15. Throughout the course of her employment with DMR as case manager for DM and for others, Plaintiff performed the responsibilities required of her in a professional, competent, efficient and diligent manner; at all times she articulated the official position of the Department and she otherwise comported herself in a manner which was reasonable intended to accomplish the goals and purposes underlying creation and operation of DMR as set forth in Ohio law.

16. In fact and contrary to the representations of DMR and its designated representatives, Plaintiff was discharged so as to penalize Plaintiff for exercising her First Amendment rights in criticizing DMR policies and positions relative to the provision of services and resources for juveniles such as DM who are mildly retarded and that her discharge was for no other valid, legitimate or reasonable governmental purpose.

17. The actions of each and all of these Defendants under color of state law, to wit: Section 123;1-19-01 of the Ohio Administrative Code, (124.27 O.R.C.), in terminating her employment with DMR in the aforementioned manner for the previously stated reasons violated the First and Fourteenth Amendments to the United States Constitution in that these actions and all others related thereto were intended to and did in fact punish Plaintiff for her exercise of her freedom of speech. Plaintiff's rights, privileges and immunities in this regard are guaranteed to her by the First and Fourteenth Amendments of the United States Constitution and by 42 U.S.C. 1983.

COUNT II

18. Plaintiff repeats and reaffirms as if fully rewritten herein paragraphs 1 through 17 and further asserts that DM and other clients of DMR represented by Plaintiff qualify as handicapped individuals within the purview of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794; 29 U.S.C. 706(7)].

19. DMR receives federal financial assistance, primary objectives of which are to finance employment for personnel such as Plaintiff who provide benefits for handicapped persons and to provide services to handicapped persons.

20. In deterring, frustrating and/or preventing Plaintiff from assisting DM and others who suffer similar handicaps; by removing Plaintiff from her position with the Department; and in promulgating and asserting the position that DMR had no responsibility for DM and other juveniles who are mildly or moderately retarded, the Defendants and each of them established policies and utilized methods of administration which had and have the effect of substantially impairing the purposes and goals of DMR which is to provide services to handicapped persons as set forth in 5123.67 O.R.C. all in violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794].

COUNT III

21. Plaintiff repeats and reaffirms as if fully rewritten herein paragraphs 1 through 20 and further asserts that the foregoing acts of the Defendants and each of them constituted retaliation against Plaintiff for advocating the rights of handicapped persons, as previously described, in violation of Section 504 of the Rehabilitation Act of 1973.

COUNT IV

22. Plaintiff repeats and reaffirms as if fully rewritten herein paragraphs 1 through 21 and further alleges that the acts of these Defendants in firing Plaintiff as aforesaid constitute a violation of 42 U.S.C. 1983 in that said acts were intended to and did in fact deprive Plaintiff of rights, privileges and immunities provided by federal law, to wit: Section 504 of the Rehabilitation Act of 1973 (Section 29 U.S.C. 974).

WHEREFORE, Plaintiff, Mary Kate Leaman, respectfully requests that this Court render judgment as follows:

1. Temporary and permanent injunctive relief against these Defendants, their agents, assistants and all other per-

sons acting in concert or in cooperation with them reinstating Plaintiff's employment status with DMR.

2. Temporary and permanent injuctive relief against these Defendants, their agents, assistants and all other persons acting in concert or in cooperation with them directing said Defendants to cease and desist from effecting, maintaining and/or enforcing policies and methods of administration which impair the purposes or goals of DMR as set forth in 5123.67 O.R.C.

3. An award of damages in the form of backpay and lost benefits from the effective date of Plaintiff's discharge.

4. An award of exemplary damages in the amount of $25,000.00 against each of the following Defendants: Minnie Fells Johnson, Sandra Crockett, Loyce Scott and Shirley Wilson-Young.

5. An award to Plaintiff of her reasonable attorney fees and costs herein pursuant to 42 U.S.C. 1988 and 29 U.S.C. 794(a).

FURER, MOSKOWITZ & MEZIBOV

/s/ MARC D. MEZIBOV
Trial Counsel for Plaintiff
36 E. Fourth Street, Suite 714
Cincinnati, Ohio 45202
(513) 721-3111

JURY DEMAND

Pursuant to Rule 38 of the Ohio Rules of Civil Procedure, Plaintiff demands that all issues of fact in the foregoing Complaint be tried to a jury.

/s/ MARC D. MEZIBOV

Exhibit 'A'

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Case No. 84-REM-04-0539

MARY K. LEAMAN,

Appellant,

v.

DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellee.

REPORT AND RECOMMENDATION
June 25, 1984

To the Honorable State Personnel Board of Review:

This cause came on for hearing on June 12, 1984, upon the appeal of Mary K. Leaman filed April 18, 1984. In her appeal, Ms. Leaman alleges that she has been removed from her position. Present at hearing on behalf of Appellant was Attorney Marc E. Myers; also present was William J. McDonald, Assistant Attorney General, on behalf of Appellee Department of Mental Retardation and Developmental Disabilities.

Mr. McDonald had filed a motion to dismiss on June 1, 1984, alleging that the Appellant had been removed during the second half of her probationary period and therefore the Personnel Board of Review was without jurisdiction to review her removal. Counsel for the Appellant argued the case at hearing.

Having considered the motion to dismiss as well as the attached documents and considered the argument of counsel for

the Appellant, a motion to dismiss for lack of jurisdiction is well taken. Ms. Leaman was appointed to the position of Case Management Specialist 1 effective December 12, 1983. As such, she was in pay range 28, step 1, and therefore according to Ohio Administrative Code Section 123:1-19-02, required to serve a probationary period of one hundred and twenty (120) calendar days. She was removed from her position effective April 7, 1984, one hundred and eighteen (118) days after her initial appointment. Appellant received a letter dated April 4, 1984, informing her that she was being dismissed during her probationary period and listing the reasons for this personnel action.

According to Ohio Revised Code Section 124.27, "if the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period with the completion of sixty (60) days or one half of his probationary period whichever is greater." Pursuant to Administrative Code Section 124-1-06, "the Board [Personnel Board of Review] has no jurisdiction over removals or reductions in the second half of a probationary period except to determine whether the appointing authority has complied with the rules governing such actions." Specifically, the appointing authority is obliged to furnish the reason for the probationary removal in writing to the affected employee. There is no prescribed format to which the appointing authority must adhere.

Considering the facts herein, I can only conclude that this was a removal during the second half of Appellant's probationary period; that the Appellant was duly notified of the reasons for this personnel action in compliance with statute and rule; and that therefore this Board is without jurisdiction. It is therefore RECOMMENDED that this appeal be DISMISSED.

/s/ KATHLEEN M. DAUGHERTY
Administrative Law Judge

Exhibit 'B'

Ohio Department of
Mental Retardation and Developmental Disabilities

Richard F. Celeste, Governor

April 4, 1984

Ms. Mary Kate Leaman
1008 Park Lane
Middletown, Ohio 45042

Dear Ms. Leaman:

Pursuant to Section 123:1-19-01 the following areas were deemed sufficient to determine that you were unable to meet the requirements of the Case Management position.

When given specific assignments you did not follow through in a timely manner and had to be constantly prodded to complete them.

As the evaluations state, you needed constant supervision because you articulated incorrectly the position of the Department when your responsibilities were to the contrary.

Your interaction with peers, colleagues and supervisors created very stressful moments leading to shouting, angrily leaving rooms on more than one occasion and causing dissension and discord that mitigated against a cohesive work relationship.

Therefore, effective April 7, 1984, you are probationally removed from your position with this department.

/s/ SANDRA A. CROCKETT
Designee
Sandra A. Crockett, Ph.D.
Commissioner of Program Services

/s/ MINNIE FELLS JOHNSON, Ph.D.
Director